(1) Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

M.C. PRODUCTS, INC., a California corporation; AUDIO ENTERTAINMENT NETWORK, INC., a Nevada corporation; DAVID L. KAHN,

Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, now AT&T Corp.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTION PRESENTED FOR REVIEW

Whether a district court has the power, without prior notice to the parties, and contrary to Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952), and contrary to 28 U.S.C. Section 1404(a), to dismiss sua sponte an action with prejudice, unless within 30 days the complaint is refiled in another district.

PARTIES TO THE PROCEEDING

Petitioners

M.C. Products, Inc. ("MCP") is a California corporation. Bellatrix International, Inc. owns 100% of its outstanding stock. Audio Entertainment Network, Inc. ("AEN") is a Nevada Corporation. Petitioner David Kahn owns 100% of its outstanding stock.

Respondent

The respondent is AT&T Corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in M.C. Products, Inc. ("MCP") v. American Telephone and Telegraph Company ("AT&T") is unreported. A copy of the opinion is included at Appendix ("App.") A at 1a-10a. The opinion of the United States Court of Appeals for the Ninth Circuit in Audio Entertainment Network, Inc. ("AEN") and David L. Kahn v. American Telephone and Telegraph Company is unreported. A copy of the opinion is included in App. B at 11a-17a. Both opinions are published on the Internet at LEXIS-NEXIS and at WESTLAW, 1999 WL 1253223, 2000-1 Trade Case P72,752 and 1999 WL 1269329.

The order of the district court dismissing the MCP action is included in App. C at 15a-17a. The order of the district court dismissing the AEN and Kahn action is included in App. D at 18a-20a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion in the MCP action on December 22, 1999, and in the AEN and Kahn action on December 28, 1999. The Court of Appeals denied MCP's petition for rehearing on February 2, 2000 (App. E at 21a-21b) and denied AEN and Kahn's petition for rehearing on February 11, 2000 (App. F at 22a-23a).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1404(a)

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT OF THE CASE

This is a joint petition by M.C. Products, Inc., a California corporation, and Audio Entertainment Network, Inc., a Nevada corporation, from different judgments; but involving identical questions (Rules of Sup. Ct. 12.4). Both parties had filed complaints in the United States District Court for the Central District of California averring Federal claims and purely pendant state claims. By stipulation and order both actions were stayed from time to time pending the resolution of some of the same issues by a different plaintiff[1] against the same defendant AT&T Corp., Respondent here (App. G at 37a, 38a, 39a). At the last status conference on September 21, 1998, the actions were transferred from the judge to whom they had been originally assigned (App. E at 4a). Prior to that status conference the parties had filed a joint status report stating:

> "[A]ll parties believe the more prudent course would be to continue the stay until the Ninth Circuit decides MRO's appeal in the Nevada Action" (App. I at 6a).

Disregarding that stipulation, the judge ordered (App. C at 16a):

> Upon consideration of the Joint Status Report, dated September 15, 1998, submitted in the above captioned matter, and upon hearing

---

[1] MRO Communications, Inc. v. American Telephone and Telegraph Company, now AT&T Corp. MRO has filed a Petition for Certiorari, No. 99-1480, in this Court in that action. MRO's Petition raises antitrust issues.

> counsel for both plaintiff M.C. Products, Inc. and defendant AT&T corp. ("AT&T") at the September 21, 1998 status conference, it is HEREBY ORDERED, ADJUDGED, AND DECREED THAT:
>
> Plaintiff's Second Amended Complaint is dismissed in its entirety without prejudice. Plaintiff must re-file any claim(s) asserted in its Second Amended Complaint in the United States District Court for the District of Nevada, as a related matter to the case captioned MRO Communications, Inc. v. AT&T Corp., CV-S-95-503 PLP (RLH), within 30 days from the date of this Order, or the Action shall be dismissed with prejudice.
>
> IT IS SO ORDERED.

Rather than file in Nevada, Petitioners M.C. Products, Inc. and Audio Entertainment Network, Inc. appealed (App. G at 43a; App. K at 120a). The Court of Appeals affirmed relying on this Court's opinion in Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952) (App. A at 3a). This was error because Kerotest permitted only a stay, not a dismissal.

The Court of Appeal also held in the MCP appeal that if the MCP action had been refiled in Nevada, equitable tolling would have prevented the running of the statute of limitations during the almost six years the action had been pending. (App. A at 8a). There is literally no law supporting this holding, particularly as to MCP's pendant state claims described in the District Court's earlier order denying AT&T's motion for summary judgment (App. H at 53a-54a).

In the AEN appeal the Court of Appeals again affirmed, without discussing the statute of limitations problem and relying on Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800 (1976) (App. B at 13a). The dismissal in Colorado River did not involve the statute of limitations and was expressly based on the policy of the McCarran Amendment, 43 U.S.C. Section 666, not involved in this action.

MRO and AEN contend that both the District Court and the Court of Appeals erred because there is no law authorizing dismissals in these actions. The actions could have been stayed as the parties had stipulated, Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952) or transferred under 28 U.S.C. Section 1404(a).

Petitioners are not here arguing that the district court abused its discretion. Under 28 U.S.C. Section 1404(a), the district court had no power to dismiss, only to transfer.

REASONS FOR GRANTING THE WRIT

I. A UNITED STATES COURT OF APPEALS HAS SANCTIONED SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

While the opinion is unreported, it has been fully published on the Internet (by both LEXIS-NEXIS and WESTLAW), and will certainly be used to clear dockets, at least in the Ninth Circuit. It is an abuse of power and should be curtailed before it spreads.

II. THE COURT OF APPEALS DECISION IS CONTRARY TO A DECISION OF THIS COURT, KEROTEST MFG. CO. V. C-O-TWO EQUIPMENT CO., 342 U.S. 180 (1952), AND CONTRARY TO 28 U.S.C. SECTION 1404(A).

Kerotest held that under the doctrine of comity a declaratory judgment action in Delaware could be stayed pending the trial of a patent infringement action in Illinois. The Delaware action involved the same patent, and the same parties were involved in the Illinois action.

Kerotest does not authorize what was done in this case: without prior notice forcing a refiling of plaintiff's claims (federal and state) in another district by dismissing the action with prejudice unless within 30 days Plaintiff refiled in the other district (App. A at 3a and App. B at 13a). Congress has provided the only proper way to transfer an action to another Federal forum when it is appropriate to do so, 28 U.S.C. Section 1404(a). No reason is given in the opinions for not following the statute.

What was done in this Case was thus contrary to precedent and statute. While it is true that some courts have permitted dismissals under comity where the parties and issues are identical, in this case the Ninth Circuit did not find that the parties and issues were "identical". Instead, it found that the parties and issues were only "substantially similar" (App. A at 4a and App. B at 13a).

Both Memorandum opinions omit to state that the District Court's orders were made at a scheduled status conference at which the parties appeared, and prior to which the parties had joined in Joint Status Reports requesting a

further stay pending resolution of the appeal in the MRO action in Nevada (App. I at 60a and App. L at 124a).

CONCLUSION

The Petition should be granted to correct this abuse of power by the district court and to prevent its spread.

Dated: March 16, 2000. Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

[Filed December 22, 1999]

No. 98-56964
D.C. No. CV-93-06285-LEW

In re: M.C. PRODUCTS, INC., *Debtor.*	)
M.C. PRODUCTS, INC. *Plaintiff-Appellant,*	)
and	)
MRO COMMUNICATIONS, a Nevada Corp., *Plaintiff-Appellant,*	)
v.	)
AMERICAN TELEPHONE & TELEGRAPH COMPANY, *Defendant-Appellee.*	)

Court of Appeals Memorandum - 12/22/99

Appeal from the United States District Court
for the Central District of California
Laughlin E. Waters, District Judge, Presiding

Argued and Submitted November 2, 1999
San Francisco, California

MEMORANDUM[1]

Before: CHOY, SCHROEDER and ALARCON, Circuit Judges.

M.C. Products ("MCP") appeals the district court's dismissal of its action under the principle of federal comity. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Analysis

I. Standard of Review

This court reviews for abuse of discretion a district court's disposition of a case under the principle of federal comity. Pacesetter Systems, Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982). Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

weighing of the relevant factors. Solomon v. North Am. Life and Cas. Ins. Co.,151 F.3d 1132, 1138-39 (9th Cir. 1998).

II. Federal Comity Doctrine

It is well recognized that a federal district court has the inherent power to administer its docket in a manner that conserves scarce judicial resources and promotes the efficient and comprehensive disposition of cases. Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 749 (9th Cir. 1979). Under the principle of federal comity, a district court "has discretion to transfer, stay, or dismiss" an action whenever it is duplicative of a parallel action already pending in another federal court.[2] Cedars-Sinai Medical Ctr. v. Shalala, 125 F.3d 765, 769 (9th Cir. 1997).

This court must determine whether the court below abused its discretion in dismissing the MCP suit as duplicative of the MRO litigation now on appeal from the District of Nevada. We hold that it did not.

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[2] In passing, MCP contends that dismissal of a first-filed suit in favor of a second-filed suit is improper. However, this court has held that where duplicative actions are pending in two federal courts, and the second-filed suit has progressed further than the first-filed suit, dismissal of the first in favor of the second is appropriate. Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 750 (9th Cir. 1979).

A. Duplicative Actions

As the Supreme Court noted in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), no precise test has evolved for determining whether one action is duplicative of another. Id. at 817. What is clear, however, is that district courts are to be accorded a great deal of latitude and discretion when undertaking considerations of this nature. See Kerotest Mfg.,342 U.S. at 183-184 ("[A]n ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts."). In general, a suit is duplicative of another "if the claims, parties, and available relief do not significantly differ between the two actions." Serlin v. Arthur Andersen & Co., 3 F.3d 221, 223 (7th Cir. 1993). Here, the claims, parties, and available relief in the MCP and MRO actions are not significantly different. Thus, the court below did not abuse its discretion in finding the two actions duplicative and dismissing the case before it.

1. Duplicative Claims

Since September 1995, MCP has obtained stays of its action by professing the vast similarities between its case and the MRO litigation. MCP even avoided a dismissal for want of prosecution by arguing that "indirectly, considerable activity has been going on in this action" through the litigation of a "companion" action in Nevada, which would "dispose of many of the legal and factual issues in this action." [SER 263]. MCP repeatedly informed the district court that substantially the same parties, attorneys, facts, issues, and witnesses were involved in both actions. [See, e.g., ER 92, 98; SER 263, 268]. In fact, at a status hearing on September 21, 1998, MCP admitted that all the issues in this action

would ultimately be resolved by the Nevada action. [ER 114].[3] At that time, the district court decided that a further stay of this case would be a "waste of time," and it dismissed the action without prejudice for thirty days. [ER 114].

On appeal, MCP has suddenly changed its mind. It now seeks to distinguish the two actions by pointing to three sets of claims in this action which it contends have no counterpart in the Nevada suit. The first two sets of purportedly different claims concern AT&T's alleged violation of the Bankruptcy Code. First, MCP points to its allegations that AT&T's termination of its 900 numbers during bankruptcy violated §§ 362 and 542 of the Bankruptcy

---

[3] The transcript of the status hearing contains the following exchange:

> THE COURT: What you're telling me is all the issues that are here in this lawsuit are before the Las Vegas court, and have been decided by Judge Pro, or are on appeal from Judge Pro. And whatever the result of that appeal will be, it will go back to Judge Pro, if they reverse, and will be taken up by Judge Pro in Las Vegas. So why are we wasting our time?
>
> MR. ARCHER (counsel for MCP): Well, that's why we've agreed that these cases here can be stayed pending -
>
> THE COURT: No, we're not talking about stays. That's a waste of time. If Judge Pro will decide all the issues, why should we stay it?

Code. Second, MCP notes its allegations that AT&T's "transfer" of the 900 lines to itself was a fraudulent conveyance in violation of §§ 544(b) and 548(a)(2) of the Bankruptcy Code. However, all of these bankruptcy claims turn on whether MCP had a proprietary interest in the canceled 900 numbers; *i.e.*, if the 900 lines were not MCP's assets, then AT&T could not have committed the violations alleged. That issue was fully litigated in the Nevada action and decided squarely against MRO. [SER 307-09]. Thus, the bankruptcy claims do not sufficiently distinguish the MCP and MRO suits.

Finally, MCP argues that the two actions differ because it asserted antitrust claims under California's Cartwright Act in this action but not in the Nevada action. However, the substance of the antitrust claims is the same in both actions; namely, MCP alleges that AT&T violated the antitrust laws by "tying" billing and transport services. The addition of a Cartwright Act claim to Sherman Act claims based on the same underlying factual allegations does not sufficiently distinguish the cases for the purpose of comity. In fact, California's antitrust law, which mirrors federal antitrust law, follows federal precedent. See McGlinchy v. Shell Chemical Co., 845 F.2d 802, 811 n. 4 (9th Cir. 1988) (dismissing both Sherman and Cartwright Act antitrust claims for failure to show antitrust injury, noting that "California state courts follow federal cases in deciding claims under the Cartwright Act"); Fiko v. Amana Refrigeration, Inc.,709 F.2d 1257, 1268 (9th Cir. 1983) ("Cartwright Act claims raise basically the same issues as do Sherman Act claims."). Thus, the addition of state antitrust claims to the MCP action does not sufficiently distinguish the two suits.

2. Duplicative Parties

MCP further contends, again contrary to its prior assertions, that the parties in the two suits are different. It notes that MCP and David Kahn are not named plaintiffs in the Nevada action. However, David Kahn owns 100% of MCP and 82% of MRO, two companies that are adjacent links in the same chain of business. Moreover, the interests of MCP and MRO with respect to AT&T are identical. Thus, for the purpose of federal comity, David Kahn and his two companies can be treated as the same entity.

3. Duplicative Relief

MCP argues that the relief available in the MCP and MRO suits is significantly different. It asserts that under the four-year statute of limitation for private antitrust actions, the district court's dismissal of its action effectively time-barred those anti-trust claims that arose before September 1994. As a result, MCP contends, it will be unable to recover more than three years of damages on those claims. Ironically, MCP's pessimism is not grounded in the case law, for the equitable tolling doctrine would have protected all of MCP's antitrust claims if they had been re-filed in the District of Nevada.

Although statutes of limitation are designed "to assure fairness to defendants," flexibility in applying a limitation period to bar actions is necessary to further the interests of justice. Burnett v. New York Central R.R. Co., 380 U.S. 424, 428 (1965). Equitable tolling applies "when external forces, rather than plaintiff's lack of diligence, account for the failure to file a timely claim." Seattle Audobon Society v.

Robertson, 931 F.2d 590, 596 (9th Cir. 1991). In this case, the district court structured its dismissal so as to allow MCP to re-file its claims in the District of Nevada. In fact, the court below made clear that it was "going to continue the matter for thirty days with that dismissal" so that Mr. Kahn's lawsuits could be joined "in Las Vegas where they belong." [ER 116]. Given the District Court's expectations, as well as the certainty that re-filing would not "unjustly prejudice" AT&T, the equitable tolling doctrine would have defeated any statute-of-limitation defense that AT&T might have raised. Seattle Audobon Society, 931 F.2d at 597. Thus, to move forward with its action, MCP simply had to re-file in the District of Nevada. It chose not to do so. For that, it has only itself to blame.

3. Conclusion

The Supreme Court has noted that "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution[s]" to the problem of duplicative litigation. Keroset Mfg., 342 U.S. at 183. The court below was thus correct to exalt substance over form. MCP cannot rely on tweaked pleadings and empty distinctions between named plaintiffs to preserve a duplicative action in federal court. Given the quality of the "differences" between the MCP and the MRO litigations, we cannot say that the district court abused its discretion in dismissing the case before it.

B. An Opportunity to be Heard

MCP also contends that dismissal was improper because it was not given the opportunity to submit a brief in opposition to the dismissal. MCP cites no relevant authority for this proposition.[4] Indeed, no such authority exists, so the District Court had no obligation to grant MCP an opportunity to submit a written memorandum in opposition to the dismissal. Moreover, at the status conference on September 21, 1999, when the District Court informed the parties of its intent to dismiss the action, MCP never even requested an opportunity to submit a brief setting forth its objections. In fact, when asked by the court to explain the differences between the present case and the Nevada action, MCP's attorney responded: "I don't think I can say it any differently than I've already said it." [ER 114].

Furthermore, even if an opportunity to submit a written memorandum were required, we would nevertheless affirm the dismissal. Where a plaintiff cannot possibly win relief under the theory it urges on appeal, "a federal appellate court is justified in resolving an issue not passed on below." Singleton v. Wulff, 428 U.S. 106, 121 (1976); see also Wong

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[4] MCP incorrectly cites several Federal Rules of Civil Procedure for this proposition. For example, MCP cites Rule 7(b)(1), which requires parties to provide written notice of motions, but does not apply to rulings by courts. It also cites Rule 16(f), which authorizes sanctions for failure to comply with scheduling orders, and Rule 37, which allows sanctions for discovery abuses. Neither Rule concerns federal comity. MCP also cites Rule 41 (b), which addresses the effect of involuntary dismissals, but imposes no notice requirements on a court.

v. Bell, 642 F.2d 359 (9th Cir. 1981) (upholding a district court's sua sponte dismissal under Fed. R. Civ. P. 12(b)(6), despite a complete lack of notice and no opportunity for briefing, because the plaintiff could not have obtained a different outcome).[5]

If it had been given the opportunity to submit a memorandum in opposition, MCP suggests that it would have argued that the parties and the issues in the two cases were not the same. However, as discussed above, such a contention is contrary to the evidence of record and to MCP's own repeated assertions over the course of the past several years. Thus, MCP could not possibly prevail on the argument it now sets forth on appeal.

AFFIRMED.

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[5] MCP cites Wong for the proposition that the district court was obligated to afford it an opportunity to submit a written memorandum in opposition. Wong, however, concerned a dismissal under Rule 12(b)(6), not federal comity. Moreover, given the decision in Wong to affirm the dismissal despite the district court's error, MCP's reliance on that case is profoundly misplaced.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

[Filed December 28, 1999]

No. 98-56965
D.C. No. CV-95-03427-LEW

AUDIO ENTERTAINMENT NETWORK, INC., a Nevada corporation; DAVID L. KAHN, on behalf of themselves and others similarly situated,	)
Plaintiff-Counter-Defendants-Appellants,	)
v.	)
AMERICAN TELEPHONE & TELEGRAPH COMPANY, now AT&T CORPORATION,	)
Defendant-Counter-Claimant Appellee.	)

Appeal from the United States District Court
for the Central District of California, Los Angeles

Court of Appeals Memorandum - 12/28/99

Laughlin E. Waters, District Judge, Presiding

Argued and Submitted November 2, 1999
San Francisco, California

MEMORANDUM[1]

Before: CHOY, SCHROEDER and ALARCON, Circuit Judges.

Audio Entertainment Network (AEN) and its owner David Kahn, on behalf of themselves and others similarly situated, appeal the district court's dismissal of their complaint against AT&T Corporation. In October 1998, the district court dismissed the complaint without prejudice and allowed thirty days for AEN and Kahn to re-file their claims in Nevada, where a substantially identical action brought by another company owned by Kahn was pending. Furthermore, the October 1998 district court order dismissed the action with prejudice if AEN and Kahn failed to re-file within the specified time. Having failed to re-file in Nevada, AEN and Kahn appeal the October 1998 order. We have jurisdiction under 28 U.S.C. § 1291 and affirm the district court.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3

Analysis

The district court dismissed the AEN [2] action to allow the parties to join all the related complaints in an action in Nevada on the basis that the AEN action was duplicative of the earlier-filed Nevada action. Where a complaint involving the same parties and same issues has already been filed in a different federal district, the court in which the second suit is filed may either transfer, stay or dismiss the second suit. See Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 625 (9th Cir. 1991). We review the district court's decision to dismiss under the federal comity doctrine, the first-to-file rule, for an abuse of discretion. See Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 95 (9th Cir. 1982).

We hold that the district court did not abuse its discretion by dismissing the case on the basis of the first-to-file rule. With respect to parties and issues involved, the action here is substantially similar to the previously-filed action pending in Nevada. The parties and issues do not need to be exactly identical. In Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), the Supreme Court explained that circumstances permitting a federal court to defer to another federal court are broader than circumstances justifying federal court deferral to a state proceeding. Id. at 817 (between federal district courts, "though no precise rule has evolved, the general principle is

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[2] Unless otherwise specified, references to "AEN" include David Kahn since Kahn personally owns all of the stocks and assets of AEN and both Kahn and AEN assert the same claims against AT&T.

to avoid duplicative litigation"). Since we have not required that parties or issues be identical in order to justify federal court deferral to a state action, see, e.g., Nakash v. Marciano., 882 F.2d 1411, 1416 (9th Cir. 1989) ("We agree that exact parallelism does not exist, but it is not required. It is enough if the two proceedings are 'substantially similar.'") (citations omitted), we do not find an abuse of discretion when a federal court defers to another federal court where the parties and issues are substantially similar. District court's application of the first-to-file rule in this case follows our observation that the "rule is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." Pacesetter, 678 F.2d at 95.

Conclusion

We **AFFIRM** the district court's decision to dismiss the action.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed October 1, 1998]

D.C. No. CV-93-6285-LEW
BK Case No. LA 91-88209-SB
Adv. Case No. LA 92-03631-SB

In re:	)
	)
M.C. PRODUCTS (fdba Men's Care Products, Inc. and Telephone Fantasies, Inc.	)
Debtor.	)
	)
	)
M.C. PRODUCTS, INC.,	)
Plaintiff,	)
	)
AND MRO COMMUNICATIONS, a Nevada Corporation,	)
Involuntary Plaintiff,	)
	)
v.	)

AMERICAN TELEPHONE & TELEGRAPH COMPANY, dba AT&T, MRO COMMUNICATIONS, a Nevada Corporation, and DOES 1 through 50, inclusive,
Defendants.

ORDER DISMISSING ACTION

[Honorable Laughlin E. Waters; transferred to Honorable Manuel L. Real]

Upon consideration of the Joint Status Report, dated September 15, 1998, submitted in the above captioned matter, and upon hearing counsel for both plaintiff M.C. Products, Inc. and defendant AT&T Corp. ("AT&T") at the September 21, 1998 status conference, it his HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's Second Amended Complaint is dismissed in its entirety without prejudice. Plaintiff must re-file any claim(s) asserted in its Second Amended Complaint in the United States District Court for the District of Nevada, as a related matter to the case captioned MRO Communication Inc. v. AT&T Corp., CV-S-95-503 PLP (RLH), within 30 days from the date of this Order, or the Action shall be dismissed with prejudice.

IT IS SO ORDERED.

DATED: September 30, 1998

/s/_____
Honorable Manuel L. Real
United States District Judge
for the Honorable Laughlin E. Waters

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed October 1, 1998]

Case No. CV-95-3427-LEW

AUDIO ENTERTAINMENT NETWORK INC., a Nevada corporation, and DAVID L. KAHN on behalf of themselves and others similarly situated, *Plaintiffs*,	)
v.	)
AT&T CORP., formerly AMERICAN TELEPHONE & TELEGRAPH COMPANY, *Defendant*.	)

ORDER DISMISSING ACTION

[Honorable Laughlin E. Waters; transferred to Honorable Manuel L. Real]

Upon consideration of the Joint Status report, dated September 15, 1998, submitted in the above-captioned matter, and upon hearing counsel for both plaintiffs Audio

Entertainment Network, Inc. and David L. Kahn ("Plaintiffs") and defendant AT&T Corp. ("AT&T") at the September 21, 1998 status conference, it his HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiffs' First Amended Complaint is dismissed in its entirety without prejudice. Plaintiffs must re-file any claim(s).

Upon consideration of the Joint Status Report, dated September 15, 1998, submitted in the above-captioned matter, and upon hearing counsel for both plaintiff M.C. Products, Inc. ("MCP") and defendant AT&T Corp. ("AT&T") at the September 21, 1998 status conference, it his HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's Second Amended Complaint is dismissed in its entirety without prejudice. Plaintiff must re-file any claim(s) asserted in its Second Amended Complaint in the United States District Court for the District of Nevada, as a related matter to the case captioned MRO Communications, Inc. v. AT&T Corp., CV-S-95-503 PLP (RLH), within 30 days from the date of this Order, or the Action shall be dismissed with prejudice.

IT IS SO ORDERED.

DATED: September 30, 1998

/s/_____
Honorable Manuel L. Real
United States District Judge
for the Honorable Laughlin E. Waters

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

[Filed February 2, 2000]

No. 98-56964
D.C. No. CV-93-06285-LEW

In re: M.C. PRODUCTS, INC., *Debtor*.	)
M.C. PRODUCTS, INC. *Plaintiff-Appellant*,	)
and	)
MRO COMMUNICATIONS, a Nevada Corp., *Plaintiff-Appellant*,	)
v.	)
AMERICAN TELEPHONE & TELEGRAPH COMPANY, *Defendant-Appellee*.	)

ORDER

Before: CHOY, SCHROEDER and ALARCON, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judge Schroeder has voted to deny the petition for rehearing en banc, and Judges Choy and Alarcon have recommended the same.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed.R.App.P.35.

The petition for rehearing and the petition for rehearing en banc are hereby **DENIED**.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

[Filed February 11, 2000]

No. 98-56965
D.C. No. CV-95-03427-LEW

AUDIO ENTERTAINMENT NETWORK, INC., a Nevada corporation; DAVID L. KAHN, on behalf of themselves and others similarly situated,	)
Plaintiff-Counter-Defendants-Appellants,	)
v.	)
AMERICAN TELEPHONE & TELEGRAPH COMPANY, now AT&T CORPORATION,	)
Defendant-Counter-Claimant- Appellee.	)

Before: CHOY, SCHROEDER and ALARCON, Circuit Judges

ORDER

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judge Schroeder has voted to deny the petition for rehearing en banc, and Judges Choy and Alarcon have recommended the same.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are hereby DENIED.

APPENDIX G

U.S. District Court
Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 93-CV-6285

In re: MC Products Inc — Filed: 10/18/93
Assigned to: Judge Laughlin E. Waters
Demand: $0,000 — Nature of Suit: 423
Lead Docket: None — Jurisdiction: Federal Question
Dkt # in USDC Bkcy Crt : is BK# LA91-88209-SB
Dkt # in USDC Bkcy Crt : is AD# LA92-03631 SB

Cause: 28:0157 Motion for Withdrawal of Reference

MC PRODUCTS INC, Debtor In re	Matthew A Neco FAX 310-207-2803 [COR LD NTC] Matthew A Neco Law Offices 12424 Wilshire Blvd Suite 1450 Los Angeles, CA 90025 213-447-1777

MC PRODUCTS INC plaintiff	Matthew A Neco (See above) [COR LD NTC]

AMERICAN TELEPHONE & TELEGRAPH CO.
defendant

John A Graham
[COR LD NTC]
Leroy Anderson
[COR LD NTC]
Stephen Skacevic
[COR LD NTC]
Frandzel Share Robins
Kaplan & Bloom
6500 Wilshire Blvd
17th Floor
Los Angeles, CA 90048-4920
213-852-1000

Lori Huff Dillman
[COR LD NTC]
Cathy J Ostiller
FAX 213-896-6600
[COR LD NTC]
Sidley & Austin
555 West Fifth St
Suite 4000
Los Angeles, CA 90013-1010
213-896-6000

Steven M Bierman
FAX 212-906-2021
[COR LD NTC]
Alan M Unger
FAX 212-906-2021
[COR LD NTC]
Robert H Easton
FAX 212-906-2021
[COR LD NTC]

John J Kuster
FAX 212-906-2021
[COR LD NTC]
Sidley & Austin
875 Third Ave
New York, NY 10022
212-906-2000

MRO COMMUNICATIONS, a Nevada corp.
defendant

Andrew Goodman
[COR LD NTC]
Greenberg & Bass
16000 Ventura Blvd
Suite 1000
Encino, CA 91436
818-986-5687

DOES, 1-50
defendant

1/5/93	11	PROOF OF SERVICE by defendant American Telephone & of mot for summ jgm (kr) [Entry date 01/06/94]
1/7/93	14	Ex parte mot/APPLICATION by plf to ext time to file resp the mot for summ jgm & for hrg theron. by plf (kr) [Entry date 01/11/94]
10/18/93	1	NOTICE OF MOTION AND MOTION by defendant American Telephone & to withdraw the reference of Bkcy reference; Memo of P's & A's & Declar of John A Graham in suppt.

		; motion hearing set for 10:00 11/8/93 (ca) [Entry date 10/20/93]
10/18/93	3	REQUEST by defendant American Telephone & for judicial notc (es) [Entry date 10/27/93]
10/22/93	2	RESPONSE by plaintiff MC Products Inc to art's mot for w/draw of bkcy ref. [1-1] (kr) [Entry date 10/27/93]
10/29/93	4	REPLY by defendant American Telephone & to rep to mot for w/draw of bkcy ref [2-1] (kr) [Entry date 11/01/93]
11/17/93	--	LODGED ORD Gr AT&T mot for w/draw of bkcy ref submitted by defendant American Telephone & (kr) [Entry date 11/18/93]
11/24/93	--	LODGED/PROPOSED Order gr ATT's mot for w/drawal of ref (am) [Entry date 11/30/93]
11/24/93	5	OBJECTIONS by plaintiff MC Products Inc to propd ord submitted by ATT gr ATT's mot for w/drawal of ref [0-0] (am) [Entry date 11/30/93
11/30/93	6	ORDER by Judge Consuelo B. Marshall granting motion to withdraw the reference of Bkcy reference; Memo

		of P's & A's & Declar of John A Graham in suppt. [1-1] (ENT 12/9/93) terminating case (cc:all counsel) (kr)[Entry date 12/09/93].
12/20/93	7	Notice to cnsl that matter has been withdrawn frm Bkcy crt and has been assigned to Judge Laughlin E. Waters for all fur procdgs, cc ptys. (lm) [Edit date 12/20/93]
1/3/94	8	NOTICE OF MOTION AND MOTION by defendant American Telephone & for summary judgment, or in the alt for partial summary judgment req for judicial ntc ; motion hearing set for 9:00 1/24/94 (kr) [Entry date 01/04/94]
1/3/94	--	LODGED/PROPOSED stmt & jgm (kr) [Entry date 01/04/94]
1/3/94	9	APPENDIX of exh to ntc of mot & mot for sum jgm or in the alt partial sum jgm filed by defendant American Telephone & (kr) [Entry date 01/04/94]
1/5/94	10	PROOF OF SERVICE by defendant American Telephone & of jgm GR sum jgm (kr) [Entry date 01/06/94]

1/5/94	12	PROOF OF SERVICE by defendant American Telephone & of append of exh to mot (kr) [Entry date 01/06/94]
1/5/94	13	PROOF OF SERVICE by defendant American Telephone & of stmt of uncont facts & concl (kr) [Entry date 01/06/94]
1/7/94	--	LODGED/PROPOSED Order (kr) [Entry date [1/11/94]
1/11/94	15	ORDER by Judge Laughlin E. Waters setting hearing on motion for summary judgment [8-1] 9:00 2/7/94, setting hearing on motion for partial summary judgment [8-2] 9:00 2/7/94 resp is due 1/24/94. (kr) [Entry date 01/13/94]
1/11/94	16	DECLARATION of Richard J. Archer in suppt of mot to exten date for discovery c/off & to file addl interro (kr) [Entry date 01/13/94]
1/11/94	17	NOTICE OF MOTION AND MOTION by plaintiff MC Products Inc to extend date for dco & to file addl interro ; motion hearing set for 9:00 2/7/94 (kr) [Entry date 01/13/94]
1/11/94	18	NOTICE OF MOTION AND MOTION by plaintiff MC Products Inc for partial relief from ORD w/draw ref

		of bkcy mtr to US District Judge ; motion hearing set for 10:00 2/7/94 (kr) [Entry date 01/13/94]
1/12/94	19	OPPOSITION by defendant American Telephone & motion to extend date for dco & to file addl interro [17-1] (kr) [Entry date [1/13/94]
1/13/94	20	AMD NOTICE OF MOTION AND MOTION by plaintiff MC Products Inc for relief from ord w/draw ref of bkcy mtr to the US Dist Judge (kr) [Entry date 01/18/94]
1/20/94	21	MINUTES: that the motion to extend date for dco & to file addl interro [17-1] is submitted ; motion hearing by Judge Consuelo B. Marshall CR: none (kr) [Entry date 01/21/94]
1/24/94	23	Evidentiary OBJECTIONS to the decl of Ricahrd J. Archer in suppt of plfs mot to ext date for discov c/off & to file addl intero by defendant American Telephone & (kr) [Entry date 01/26/94]
1/24/94	24	OPPOSITION by defendant American Telephone & motion to extend date for dco & to file addl interro [17-1] memo of P/A; decl of Leroy Anderson (kr) [Entry date 01/26/94]

1/25/94	22	RESPONSE by defendant American Telephone & to motion for partial relief from ORD w/draw ref of bkcy mtr to US District Judge [18-1] (kr) [Entry date 01/26/94]
1/25/94	25	STATEMENT of genuine iss. by plaintiff MC Products Inc (kr) [Entry date 01/26/94]
1/25/94	26	APPENDIX filed in suppt of its memo in opp to At&T mot for summ jgm. by plaintiff MC Products Inc (kr) [Entry date 01/26/94]
1/25/94	27	OPPOSITION by plaintiff MC Products Inc motion for summary judgment [8-1] (kr) [Entry date 01/26/94]
1/26/94	28	Corrected table of auth by plaintiff MC Products Inc (kr) [Entry date 01/27/94]
1/31/94	29	STATEMENT of genuine iss by defendant American Telephone & (kr) [Entry date 2/01/94]
1/31/94	30	RESPONSE/REPLY by defendant American Telephone & to [8-1] opp to mot for summj gm (kr) [Entry date 02/01/94]

1/31/94	31	REPLY in suppt of mot to ext dco & to file interro by plaintiff MC Products Inc re [17-1] (kr) [Entry date 02/02/94]
1/31/94	32	EVIDENTIARY OBJECTIONS to the afdt of DAavid L. Kahn 1/14/92. by defendant American Telephone & (kr) [Entry date 02/02/94]
1/31/94	33	EVIDENTIARY OBJECTIONS to the decl of Michael R. Olsen dtd 1/21/94 by defendant American Telephone & (kr) [Entry date 02/02/94]
1/31/94	34	Evidentiary OBJECTIONS to the decl of Richard J. Archer dtd 1/23/94 by defendant American Telephone & (kr) [Entry date 02/02/94]
1/31/94	35	Evidentiary OBJECTIONS to the afdt of Edward L. Blaylock dtd 1/13/92 by defendant American Telephone & (kr) [Entry date 02/02/94]
1/31/94	36	Evidentiary OBJECTIONS to the afdt of Edward L. Blaylock dtd 8/19/91 by defendant American Telephone & (kr) [Entry date 02/02/94]
1/31/94	37	Evidentiary OBJECTIONS to the afdt of David Khan dtd 7/10/92 by defendant American Telephone & (kr) [Entry date 02/02/94]

1/31/94	38	Evidentiary OBJECTIONS to the decl of constance Olsen dtd 1/21/94 by defendant American Telephone & (kr) [Entry date 02/02/94]
1/31/94	39	Evidentiary OBJECTIONS to the affirmation under penalty of perjury of David L. Khan dtd 8/17/91 by defendant American Telephone & (kr) [Entry date 02/02/94]
1/31/94	40	Evidentiary OBJECTIONS to the decl of Matthew A. Neco dtd 7/10/92 by defendant American Telephone & (kr) [Entry date 02/02/94]
2/2/94	41	REPLY by plaintiff MC Products Inc in suppt of mot for partial relf from ORD w/draw ref of bkcy mtr to US Judge; memo of P/A [18-1] (kr) [Entry date 02/03/94]
2/2/94	42	REPLY in supt of mot for partial relf form ORD w/draw ref of bcky mtr to US District Judge; memo of P/A by plaintiff MC Products Inc re [18-1] (kr) [Entry date 02/03/94]
2/2/94	43	Evidentiary OBJECTIONS to the decl of Leroy Anderson subm in suppt of atts rep to plfs mot for partial relf from ORD w/draw ref of Bcky mtr to the US Dist Judge by defendant MRO

		Communications (kr) [Entry date 02/03/94]
2/3/94	44	MINUTES: re-setting hearing on motion for partial relief from ORD w/draw ref of bkcy mtr to US District Judge [18-1] 9:00 3/7/94,re-setting hearing on motion for summary judgment [8-1] 9:00 2/22/94, re-setting hearing on motion for partial summary judgment [8-2] 9:00 2/22/94 by Judge Laughlin E. Waters CR: lynne smith (cc: all counsel) (kr) [Entry date 02/07/94]
2/22/94	45	MINUTES: denying motion to extend date for dco & to file addl interro [17-1], that the motion for summary judgment [8-1] is submitted ; re depo must be completed by 3/15/94 by Judge Laughlin E. Waters CR: lynne smith (kr) [Entry date 03/01/94]
2/24/94	--	LODGED ord re: plfs mot to ext date for dco & file addl interro submitted by defendant American Telephone & (kr) [Entry date 02/25/94]
3/2/94	46	ORDER denying plfs mot to ext dco, shall be complete before 3/15/94; plfs mot to srv addl interro is DENIED by Judge Laughlin E. Waters (kr) [Entry date 03/04/94]

3/2/94	47	DECLARATION of William Kissell in suppt of reply of MRO to AT&T resp to plfs mot for partial relf from ORD w/draw ref of bkcy mtr to USD Judge by defendant MRO Communications (kr) [Entry date 03/04/94]
3/7/94	48	MINUTES: granting motion for relief from ord w/draw ref of bkcy mtr to the US Dist Judge [20-1]; with right to re-plead by Judge Laughlin E. Waters CR: lynne smith kr) [Entry date 03/15/94]
3/26/94	49	ORDER by Judge Laughlin E. Waters GRANT in part DENY in part motion for summary judgment [8-1]: Motion for S/J is denied w/the excpetion outlined below: the motion for S/J is granted as regards to the 34th and 35thclaims in the cmp. (ENT 9/28/94). mld cpys/ntc (dh) [Entry date 09/28/94]
11/30/94	50	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 3/4/94 (Re:) CR: Lynne Smith' (fvap) [Entry date 12/01/94]

7/19/95	51	ORDER TO SHOW CAUSE by Judge Laughlin E. Waters why cmp shld not be dism IN COURT HEARING RE: OSC re dismissal set on 9:00 9/5/95 obj to be fi 10 days prior to hrg dte (lk) [Entry date 07/21/95]
8/23/95	52	OBJECTIONS by plaintiff MC Products Inc to dism; decl of Richard J Archer. (lk) [Entry date 09/30/95]
8/30/95	53	REPLY by defendant American Telephone to obj to dism re [52-1] (lk) [Entry date 09/30/95]
9/5/95	54	MINUTES: OSC re dismissal; Cnsl inform Crt of pending case in Dist of Nevada; Pla informs he intends to file mot for sum jgm. Crt Ords all matters stayed until FEBRUARY 20, 1995, CASE STAYED by Judge Laughlin E. Waters CR: Lynne Smith (lk) [Entry date 09/30/95]
9/6/95	--	LODGED/PROPOSED Order re status conference (FWD TO CRD) (dh) [Entry date 09/21/95]
9/8/95	55	ORDER by Judge Laughlin E. Waters tht matter is set; status conference on 9:00 2/20/96; furth Ord that all proceedings in this case are stayed until stat conf (lk) [Entry date 09/30/95]

9/11/95	56	SUPPLEMENTAL by defendant American Telephone & proof of service of Ord re status conference. (lk) [Entry date 09/30/95]
1/26/96	57	NOTICE of hearing; Crt sets status conference on 9:00 2/26/96 (lk) [Entry date 01/31/96]
2/22/96	58	JOINT STATUS CONFERENCE REPORT by defendant American Telephone & Telegraph Co. (lk) [Entry date 03/01/96]
2/26/96	59	MINUTES: cnsl inform Crt no change in status of pending case in Nevada status conference held ; status conference set on 9:00 9/16/96 by Judge Laughlin E. Waters CR: Mrgaret Babykin (lk) [Entry date 03/07/96]
3/1/96	60	ORDER by Judge Laughlin E. Waters re Status Conference. Crt finds the stay shld continue and that a further status conf shld be held at 9:00 am on 9/16/96. (lk) [Entry date 03/12/96]
8/29/96	61	NOTICE by defendant American Telephone & of association of counsel. (lk) [Entry date 09/03/96]

9/10/96	62	Joint STATUS REPORT & request for status conf by telephone (tb) [Entry date 09/13/96]
9/16/96	63	MINUTES: ; status hearing re set on 10:00 1/22/97 ; status hearing held; stay continued by Judge Laughlin E. Waters CR: Lynne Smith (el) [Entry date 09/30/96]
1/17/97	64	JOINT STATUS REPORT (tw) [Entry date 01/27/97]
1/21/97	65	SUBMISSION OF Original Signature page accompanying joint stat rpt [64-1] (tw) [Entry date 01/27/97]
1/22/97	66	MINUTES: Mttr stayed pending fur order of the crt.; status conf reset on 9:00 5/27/97 by Judge Laughlin E. Waters CR: Lynne Smith (tw) [Entry date 01/27/97]
5/20/97	67	Joint STATUS REPORT (step) [Entry date 05/21/97]
5/27/97	69	MINUTES: ; status hearing continued on 9:00 9/29/97 by Judge Laughlin E. Waters CR: L Smith (step) [Entry date 06/09/97]
5/28/97	68	MINUTES TELEPHONE STATUS CONF: Matter called, parties present

		by telephone. Crt inquries with parties re the status of the pending case in Nevada. Crt confers with parties. Crt orders stay to cont, & matter cont for fur status conf to ; telephone conference set on 9:00 9/29/97 by Judge Laughlin E. Waters CR: Lynne Smith (pj) [Entry date 05/29/97] [Edit date 05/29/97]
9/22/97	70	Joint STATUS REPORT (step) [Entry date 09/23/97]
9/29/97	71	MINUTES TELEPHONIC HRG STATUS CONF: Status conf is hereby held. The crt orders p/t ord will need to be extended & therefore a status conf will be held on 1/26/98 at 10:00am; status conf set on 10:00 1/26/98 by Judge Laughlin E. Waters CR: Lynne Smith (pj) [Entry date 09/30/97]
1/16/98	72	JOINT STATUS REPORT (kb) [Entry date 01/20/98]
1/26/98	73	MINIITES: Crt ordes status conf cont.. ; telephone conference set on 9:00 9/21/98 by Judge Laughlin E. Waters CR: Lynne Smith (pj) [Entry date 02/13/98]
6/16/98	--	LODGED phv of Robert H Easton submitted by defendant American

		Telephone & (FWD TO CRD) fee paid (lc) [Entry date 06/17/98]
6/16/98	--	LODGED phv of Steven M Bierman submitted by defendant American Telephone & (FWD TO CRD) fee paid (lc)[Entry date 06/17/98]
6/16/98	--	LODGED phv of John J Kuster fee paid submitted by defendant American Telephone & (FWD TO CRD) (lc)[Entry date 06/17/98]
6/16/98	--	LODGED phv of Alan A Unger -fee paid- submitted by defendant American Telephone & (FWD TO CRD) Ilc) [Entry date 06/17/98]
6/23/98	74	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case filed for defendant American Telephone & by Alan M Unger. Designating Cathy J Ostiller as local counsel. Approved by Judge Dickran Tevrizian for Judge Waters. (Fee pd) (pj) [Entry date 06/24/98]
6/23/98	75	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case filed for defendant American Telephone & by Robert H Easton. Designating Cathy Ostiller as local counsel. Approved by Judge

		Dickran Tevrizian for Judge Waters (Fee pd) (pj) [Entry date 06/24/98]
6/23/98	76	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case filed for defendant American Telephone & by Steven M Bierman. Designating Cathy Ostiller as local counsel. Approved by Judge Dickran Tevrizian for Judge Waters. (Fee pd) (pj) [Entry date 06/24/98]
6/23/98	77	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case filed for defendant American Telephone & by John J Kuster. Designating Cathy Ostiller as local counsel. Approved by Judge Dickran Tevrizian for Judge Waters. (Fee pd) (pj) [Entry date 06/24/98]
6/26/98	78	PROOF OF SERVICE by defendant American Telephone & on 6/26/98 of ord on phv of J Kuster (lc) [Entry date 06/30/98]
6/26/98	79	PROOF OF SERVICE by defendant American Telephone & on 6/26/98 by mail of ord on phv applic of S Bierman (lc) [Entry date 06/30/98]
6/26/98	80	PROOF OF SERVICE by defendant American Telephone & on 6/26/98 by

		mail of ord re phv appl of R Easton (lc) [Entry date 06/30/98]
6/26/98	81	PROOF OF SERVICE by defendant American Telephone & on 6/26/98 by mail of ord re phv applic of A Unger (lc) [Entry date 06/30/98] [Edit date 06/30/98]
6/28/98	82	MINUTES: Crt transfers to cal of Judge Real ; status hearing set on 11:00 9/21/98 appr by all cnsl required by Judge Laughlin E. Waters CR: none (lc) [Entry date 08/31/98]
9/14/98	83	STATUS REPORT by plaintiff MC Products Inc (jj) [Entry date 09/16/98]
9/15/98	84	JT STATUS REPORT (lc) [Entry date 09/21/98]
9/17/98	85	ORIGINAL SIGNATURE PAGE of Richard J. Archer re jt stat report [84-1] by defendant American Telephone & (lc)[Entry date 09/21/98]
9/21/98	86	MINUTES: ; status hearing held. The crt Ords actns dism w/o prej; the ord is stayed for 30 dys. by Judge Manuel L.Real CR: Leonore LeBlanc (tw) [Entry date 09/28/98]

9/23/98	--	LODGED PROP ORD DISMISSING ACTN (FWD TO CRD) (pj)[Entry date 09/24/98]
10/1/98	87	ORDER:It is ord that plfs 2nd a/c is dism in its entirety w/o prej. Plf must refile any clms asserted in its 2nd a/c in the USDC of Nevada as a related matter to the case CV-S-95-503-PLP(RJH), within 30 dys from the date of this ord, or the actn sh be dism with prej. IT IS SO ORD. by Judge Manuel L. Real for the Hon. Laughlin E Waters terminating case (ENT 10/5/98), MD JS-6, mld copy to dft (pj) [Entry date 10/05/98]
10/7/98	88	PROOF OF SERVICE by defendant American Telephone & Telegraph Co dba AT&T on 10/6/98 of Ord dism actn filed 10/1/98 svcd Richard J Archer & Matthew A Neco cnsl for pla MC Products Inc, Andrew A. Goodman cnsl for Involuntary pla & dft MRO Communications Inc by mail (jc)[Entry date 10/09/98]
11/2/98	89	NOTICE OF APPEAL by plaintiff MC Products Inc, defendant MRO Communications to 9th C/A from Dist. Court Ord filed10/1/98 & ent 10//98 [87-2] (cc: Richard J. Archer; Matt

		Neco; Sidley & Austin) Fee: Paid (weap)
11/10/98	90	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 9/21/98 (Re: [89-1] CR: Leni LeBlanc (wdc)[Entry date 11/12/98]
11/10/98	91	TRANSCRIPT filed for proceedings held on 9/21/98 (wdc)[Entry date 11/12/98]
12/2/98	92	TRANSCRIPT DESIGNATION and ordering form for dates: 9/21/98 re transcript [91-1]CR: Leni LeBlanc (ghap) [Entry date 12/08/98]
12/11/98	93	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (wdc)
1/5/99	94	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [89-1] 98-56964 (wdc)

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed September 26, 1994]

Case No. CV-93-6285-LEW

IN RE M.C. PRODUCTS, INC.,)
DEBTOR/ M.C. PRODUCTS,)
INC. AND MRO Communications)
Plaintiff,)
)
v.)
)
AMERICAN TELEPHONE &)
TELEGRAPH COMPANY; MRO)
COMMUNICATIONS,)
Defendant.)

ORDER: MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

This case comes before the Honorable Laughlin E. Waters, United States District Judge, on defendant's Motion for Summary Judgment.

BACKGROUND:

On August 22, 1991 Debtor-Plaintiff M.C. Products filed for relief under Chapter 11 and then filed a complaint against Defendant-Movant AT&T alleging that AT&T breached contract, violated a stay and injunctive relief, intentionally interfered with contract and business advantage, violated the Federal Communications Act, and committed antitrust, Constitutional and civil rights violations.

There are 35 counts in the claim. AT&T has moved for summary judgment on the 24 counts in which it has been named as a defendant.

FACTS AND DISPUTES THEREOF:

The cast of characters in this action includes eleven "900" telephone numbers which were used to offer various kinds of informational and entertainment pay-per-call programs. Defendant AT&T provided these numbers to MRO which had entered into agreements with plaintiff M.C. Products; according to AT&T, MRO was their customer of record, but M.C. Products claims that the 900 numbers had been transferred to MRO as a service bureau in name only and that MRO was acting as their agent. MRO is now an involuntary plaintiff in this action.[1] For reasons that are in dispute, the 900 numbers were cut off. M.C. Products has filed a petition for bankruptcy under Chapter 11. Because the essence of M.C. Products's business is the services it offers

---

[1] MRO and M.C. Products have settled and MRO is no longer, a defendant in this action.

over the phone lines, the Debtor makes a series of claims against AT&T for terminating the phone service, and thus destroying the core of its business.

The AT&T 900 MultiQuest service has two prongs: AT&T provides interstate tariff transport service, which is regulated by the FCC, and AT&T also offers customers premium billing services,[2] whereby they track and bill calls to users of a given 900 number, and arrange for collection. The terms under which AT&T provides premium billing services are regulated by contract, whereas the common carrier service is regulated by federal tariff. Apparently, AT&T received two letters from MRO requesting termination of eight of the telephone numbers; because AT&T considered MRO to be the customer of record, AT&T terminated premium billing service and tariffed transport service in accordance with the request. AT&T's Master Contract allows continued transport services without billing services, but a new number must be assigned. When AT&T discovered that the other three numbers were being advertised in a pornographic magazine, those, too, were cut off. There are thus in a sense two

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[2] "Interstate tariff transport service" is the mechanism which connects a call from one place to another. AT&T obtains a rate schedule for this service via a filing with the FCC. The rates cannot be altered without making an addendum to the FCC filing.

"Premium billing services", on the other hand, are the gist of the AT&T 900 business. Premium billing service is attached to a contractual agreement between AT&T and a customer/provider; it is through premium billing services that AT&T bills users for making 900-number calls.

separate sets of circumstances in this case, one involving the eight numbers, and one involving the three numbers. M.C. Products directs most of its Opposition to the issues surrounding the three numbers.

The Three Numbers

AT&T reserves the right under the premium billing service to terminate 900 numbers which either provide access to sexually explicit programming or are advertised though sexually explicit or implicit materials. The Guidelines prohibit "[v]ulgar language, explicit or implicit descriptions of violence or sexual conduct, adult entertainment or incitement to violence". Exhibit 27 at 318 in AT&T's Appendix.

M.C. Products contends that some of the unacceptable advertisements were not even promotions for AT&T lines. Moreover, Debtor emphasizes, the AT&T Guidelines prohibit sexually explicit or implicit descriptions, not references. From M.C. Products's point of view, the content of the text of the advertisements in question is not sexually descriptive. For example, some of the ad copy reads as follows: "for the most sizzling true confessions, call . . ."; "To meet real quality singles tonight, call . . ." See Exhibit 27 at 316 in AT&T's Appendix. M.C. Products also urges that the contract, and not the Guidelines, govern their agreement with AT&T.

Further, M.C. Products points out, they consulted AT&T about the advertisements, made adjustments to them under AT&T's supervision, and had actually pulled the objectionable advertisements and invested time and money in

the revisions when the telephone lines were terminated. Affirmation Under Penalty of Perjury of David Kahn, Dated August 17, 1991 at 203. Also, M.C. Products alleges that they obtained a temporary restraining order to prevent AT&T from terminating their 900 numbers.[3]

When the three lines were terminated under premium billing services, AT&T would have been obliged to transfer the service to tariffed transport if such a switch had been

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[3] Although AT&T does not counter this assertion directly, they have included in their filings a copy of an order from Judge Lew dated August 10, 1993 in which that court affirmed a bankruptcy court's order denying M.C. Products's motion for preliminary injunction with regard to the three 900 numbers. The order explains that M.C. Products filed motions for a temporary restraining order and a preliminary injunction simultaneously:

> M.C. filed a complaint seeking to enjoin termination of these telephone lines and to cause the telephone lines to be transferred. On the same date, M.C. filed a motion for a temporary restraining order and preliminary injunction. The Bankruptcy Court denied this motion on the grounds that Appellant failed to establish that it is likely to prevail on the merits and that it would suffer irreparable injury. AT&T's Exhibit 35 at 2 in Reply to M.C. Products Inc.'s Opposition to AT&T's Motion for Summary Judgment.

The District Court order does not discuss the temporary restraining order anywhere else in the order and the circumstances surrounding the alleged issuance of a temporary restraining order remain unclear from the papers.

requested; according to AT&T, no request was made. Apparently, when AT&T terminated MRO's 900 service, AT&T also refused to reassign the numbers either to the Debtor or to Audio Entertainment Network (AEN), another bankrupt company owned by M.C. Products president David Kahn. AT&T argues that they have the right to refuse reassignment for legitimate business reasons. According to Movant, protection of their public image, and the financial insolvency of the Debtor and AEN justified AT&T's decision to withhold consent to the proposed assignment of MRO's contract rights to Debtor or AEN. Although AT&T's right to refuse reassignment under certain conditions is a legal question, the terms of the refusal are based on factual determinations.

M.C. Products also contends that, although AT&T would have been willing to extend tariffed transport service to them even after they canceled the three lines, AT&T would not allow MRO to retain the same exact numbers. Indeed, AT&T concedes that they will only provide a transfer in services if they change the numbers. In a customer's mind, though, 900 numbers are uniquely associated with a company. And MRO derives 95% of its revenue from 900 numbers. If the unique MRO number is discontinued with no forwarding message, customers assume the company is out of business and begin to patronize other services. Because companies like MRO depend on repeat customers for the bulk of their business, once a customer is lost, he/she is lost for good.

The Eight Numbers

M.C. Products presents evidence which suggests that MRO did not really terminate the lines voluntarily. The

evidence on this issue is contested but seems worthy of further exploration. Also, M.C. products contends that AT&T knew that although the Billing Services Agreement was between AT&T and MRO, M.C. Products was AT&T's real customer.

ARGUMENTS AND ANALYSIS:

A. The FCC Tariff and Ownership Interest in the Telephone Numbers:

The claims in AT&T's Motion for Summary Judgment fall into several categories, although Movant's overriding argument is that M.C. Products has no ownership interest in the 900 lines and therefore cannot challenge AT&T's actions. AT&T's motion relies heavily on the FCC Tariff which states:

> Nothing herein or elsewhere in this-tariff shall give any Customer, Assignee or Transferee any interest or proprietary right to any AT&T MultiQuest service 900 telephone number.

FCC Tariff No. 1, Sec.5.4.2.E (Appendix Exhibit 4) cited in Motion for Summary Judgment at 11. It is AT&T's contention that all of the Debtor's claims against it are defective as a matter of law because the tariff precludes any possibility that M.C. Products owns the telephone numbers and it is this premise upon which M.C. Products bases its claims.

One key question is whether the telephone numbers are part of the company estate for bankruptcy purposes even if they are not actually the Debtor's "property". For the Debtor

in this case, the telephone numbers comprise the mainstay of the business and are thus an essential component of a successful reorganization. M.C. Products and AT&T dispute the authority of In Re Best Re-Manufacturing Co., 453 F. 2d 848 (9th Cir. 1971) cert. denied, 406 U.S. 919, 92 S. Ct. 1771, 32 L. Ed. 2d 118 (1972) a case which specifically considers the ownership rights in a telephone number and concludes that there are no property rights in them. Id. 453 F. 2d at 849-50. (See attached case) Although Best Re-Manufacturing does seem to support AT&T's case in that it explicitly states that a debtor is not in possession of a particular AT&T number and that unique number does not constitute property for bankruptcy cases, Id. at 849-50 M.C. Products argues that Best Re-Manufacturing is inapplicable in their case because it applies the old Bankruptcy Act notions of property. Also, M.C. Products quotes at length from a Fifth Circuit opinion in which that court rejected Best Re-Manufacturing and concluded that a company's "self-serving" tariff cannot be relied on to "determine the meaning of the term "property" in the federal bankruptcy statute." Contrary to the Best Re-Manufacturing decision the Fifth Circuit court concluded that particular telephone numbers were valuable assets for a company and should be protected. In Re Fountainebleau Hotel Corporation 508 F.2d 1056, 1059 (1975). Cited in Opposition at 21-2.

It is also worth noting that the Ninth Circuit Best Re-Manufacturing opinion is twenty-three years old; the "high tech" nature of business practices today and the increasing reliance on telecommunications for businesses on the information highway surely requires that certain conceptions in the law be re-thought. The explosion in the 900 number

business is itself quite recent and the significance of telephone business has certainly changed considerably since 1971.

B. Breach of Contract and the Covenant of Good Faith

AT&T argues that the Debtor cannot make any state law contract claims because the tariff governs the agreement between MRO and AT&T. Because the factual circumstances of the agreement between the parties are unclear, it seems premature to determine which parts of the arrangement were covered by the tariff and which were controlled by the contract.

AT&T also insists that because MRO, and not M.C. Products, was the party to the Master Contract, Debtor has no standing to present a challenge to AT&T's actions with respect to the Billing Services Agreement. Debtor contends that there are questions of fact as to whether M.C. Products was an intended third-party beneficiary of the contract between MRO and AT&T. In the Reply AT&T notes that New Jersey law governs on this issue and asks the court to take judicial notice (see below) of a 1940 case which ruled that recognition of third-party beneficiary status turns on the question of the intent of the contracting parties. Reply at 13 citing Borough of Brooklawn v. Brooklyn Housing Corp., 11 A. 2d 83 (1940) reproduced in Exhibit 34 attached to Reply. The question of intent is clearly a fact in dispute in this case. Although Movant contests the evidence M.C. Products offers in support of its version of the facts, the objections may go to the form of the evidence rather than the substance which might be admissible. See Kahn Affidavit in M.C. Products Appendix at 209-10; AT&T's Evidentiary Objections to the Affidavit of David Kahn Dated January 14, 1992 at 9-10.

C. Turnover, Violation of Stay, Injunctive Relief, and Fraudulent Conveyance

AT&T discounts the validity of these claims because they are based on M.C.Products's premise that they have an ownership interest in the numbers. Further, AT&T argues, because the lines and numbers no longer exist, there is no longer any property in question. This argument seems flawed because it rests on the presumption that the numbers were rightfully terminated, a question which is fact-sensitive and remains to be determined at trial.

D. Intentional Interference with Contract, and Business Advantage; Conspiracy

AT&T's argument here is again predicated on the notion that they acted properly in terminating the telephone lines. Because that underlying factual question has yet to be resolved, these claims cannot be invalidated or ruled on at this time.

E. Violation of the Federal Communications Act

The arguments here rely heavily on the ownership question, but they also raise a number of other points about whether the FCA governs AT&T's Premium Billing Services. Whereas the law cited by the Movant seems applicable (copies of two FCC decisions are included in AT&T's Appendix as Exhibits 32 and 33) the facts as to which lines were terminated for which reasons are quite muddled. It therefore remains difficult to sort out whether the FCA has been violated.

F. Constitutional and Civil Rights Violations

M.C. Products has conceded that these claims should be dismissed without prejudice. See Opposition p. 31; AT&T's Exhibit #1 pp. 53-54

G. Antitrust Claims: Tying, Essential Facilities Doctrine,

AT&T attempts to reject all of M.C. Products's antitrust claims on the grounds that there was no antitrust injury or illegal tying, and that AT&T does not compete with the Debtor in the same market. M.C. Products argues that AT&T acted intentionally to disrupt their business and that AT&T's disproportionate power in the telecommunications market allowed it to engage in illegal tying practices which essentially monopolize a customer's business once a customer has received a telephone number from AT&T. When AT&T terminated M.C. Products's services, they allegedly denied the Debtor access to an essential facility in violation of the Essential Facilities Doctrine. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F. 2d 536 (9th Cir.1991)

The antitrust claims may well be the weakest in M.C. Products's case. After all, antitrust cannot be used as a catch-all for tortious business conduct. Havaco of America, Ltd. v. Shell Oil Co., 626 F. 2d 549 (7th Cir. 1980); Hunt v. Cromboch 65 S.Ct. 1545 (1945); ECOS Electronics Corp. v. Underwriters Laboratories, 743 F. 2d 498 (7th Cir. 1984). See Motion for Summary Judgment at 32. M.C. Products, however, does have some authority for its positions. But more importantly, the legal questions here turn mostly on a clearer determination of the facts than is presently before us.

Given the current confusion about the facts in this case, it would be premature to rule out even these claims at this point.

CONCLUSION:

AT&T argues that there are no genuine issues of fact; however, M.C. Products has come forward with numerous pieces of evidence which contradict AT&T's position. Although it appears that some of this evidence may be inadmissible -- indeed, AT&T has submitted line by line objections to most of Plaintiff's evidence -- it does not appear that Movant has demonstrated an absence of any genuine issue of fact for trial. Therefore, Movant has not sustained its burden of proof in accordance with the standard for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986) .

Based on the foregoing, defendant's Motion for Summary Judgment is DENIED with an exception outlined below. Summary judgment is not warranted in this case because a number of significant factual disputes are not resolved in the papers. The plaintiff has created enough uncertainty with regard to some of the key issues in the case to indicate that the parties are at odds on the basic issues of the case and a granting of summary judgment would be premature at this point.

The Motion for Summary Judgment is GRANTED as regards the thirty-fourth and thirty-fifth claims in the complaint. These claims are, respectively, against AT&T and MRO for Violation of Article 1, Section 2 and the Due Process Clause of the California Constitution; and against AT&T and MRO for Violation of the Unruh Civil Rights Act

Civil Code Section 51 et seq. The Debtor has conceded that these claims may be dismissed without prejudice. See Opposition p. 31; AT&T's Exhibit #1 pp.53-4.

IT IS SO ORDERED.

DATED: 26 September, 1994

/s/_____
LAUGHLIN E. WATERS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Dated September 21, 1998]

Case No. CV-93-6285-LEW
BK Case No. LA 91-88209-SB
Adv. Case No. LA 92-03631-SB

In re	)
	)
M.C. PRODUCTS (fdba Men's Care Products, Inc. and Telephone Fantasies, Inc.), *Debtor.*	)
	)
M.C. PRODUCTS, INC., *Plaintiffs*,	)
	)
AND MRO COMMUNICATIONS a Nevada Corporation, *Involuntary Plaintiff,*	)
	)
v.	)
	)

AMERICAN TELEPHONE &)
TELEGRAPH COMPANY dba)
AT&T, MRO)
COMMUNICATIONS, a Nevada)
Corporation, and DOES 1 through)
50, inclusive,)
Defendants.)
)

Date: September 21, 1998
Time: 11:00 a.m.
Place: Courtroom 8

JOINT STATUS REPORT

[Honorable Laughlin E. Waters; transferred to Honorable Manuel L. Real]

Plaintiff M.C. Products, Inc. ("MCP"), Involuntary Plaintiff MRO Communications, Inc. ("MRO"), and Defendant AT&T Corp. ("AT&T") hereby submit the following Joint Status Conference Report in connection with the above-entitled actions. This Joint Report supersedes Plaintiff's Status Report filed by plaintiff on or about September 9, 1998.

I. State of Discovery, Pre-Trial, and Trial

The discovery cut-off has passed, and all further discovery is closed in this action. No pre-trial or trial dates have been set in this action. The Court has not permitted further motions to be filed in the present action.

II. Schedule of Contemplated Law and Motion Matter

At the Status Conference on September 29, 1997, the Court extended the stay that had been imposed initially on September 5, 1995 in this action because of a related civil action pending in the District of Nevada, MRO Communications, Inc. v. AT&T Corp., CV-S-95-503 PLP (RLH) (the "Nevada Action"). That related action involves substantially the same parties and attorneys as well as a billing services agreement similar to the one that is at issue in this case.

At the conclusion of a two-week jury trial in May 1998, United States District Judge Philip M. Pro entered judgment as a matter of law pursuant to Fed. R. Civ. P. 50 in the Nevada Action in favor of AT&T on all claims that had not been previously dismissed. Judgment was entered on August 3, 1998 pursuant to Fed. R. Civ. P. 54(b), in favor of AT&T on all of MRO's 28 claims, and in AT&T's favor on its First Counterclaim (the "Judgment"). Two of AT&T's counterclaims were deferred and currently are pending in the Nevada Action. Judge Pro denied MRO's motion for a new trial on July 30, 1998. On August 27, 1998, MRO filed a notice of appeal from the Judgment in the Nevada Action.

III. The Parties' Position Re: Stay Order

AT&T is confident that the Court of Appeals will affirm the Judgment in the Nevada Action. MCP and MRO are confident that MRO will prevail on the appeal in the Nevada Action. AT&T intends to make a dispositive motion for summary judgment in this Action to dismiss all of MCP's claims based upon the Judgment in the Nevada Action, based

upon the principles of issue and claim preclusion. MCP will oppose such a motion. Rather than litigate such a motion now, or otherwise proceed to trial in this Action, however, all parties believe the more prudent course would be to continue the stay until the Ninth Circuit decides MRO's appeal in the Nevada Action. Continuing the stay will promote judicial economy, as well as conserve the resources of the parties, because it would significantly reduce the risk that a judgment in this Action would have to be modified in the light of the disposition of MRO's appeal to the Ninth Circuit in the Nevada Action.

IV. Miscellaneous

The parties respectfully request that the status conference be by telephone, in accordance with the practice established by this Court in regard to previous status conferences in this Action.

DATED: September __, 1998

ARCHER & HANSON
Richard J. Archer

By:/s/_____
Richard J. Archer
Attorneys for Plaintiff M.C. Products, Inc. and Involuntary Plaintiff MRO Communications, Inc

DATED: September 15, 1998

SIDLEY & AUSTIN
Steven M. Bierman
Alan M. Unger
John J. Kuster

By:/s/_____
Steven M. Bierman
Attorneys for Defendant AT&T Corp.

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed August 30, 1995]

CASE NO. 95-3427 RAP

AUDIO ENTERTAINMENT NETWORK, INC., a Nevada Corporation, and DAVID L. KAHN, on Behalf of Themselves and Others Similarly Situated, *Plaintiffs,*	)
v.	)
AT&T CORP., d/b/a AMERICAN TELEPHONE & TELEGRAPH COMPANY, and/or AT&T *Defendant.*	)

FIRST AMENDED COMPLAINT FOR BREACH OF CONTRACT, TORTIOUS BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE, VIOLATION OF ANTITRUST LAWS, VIOLATION OF FEDERAL COMMUNICATIONS ACT, ACCOUNTING, BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, VIOLATION OF THE BANKRUPTCY CODE, AND CLASS ACTION.

Plaintiffs Audio Entertainment Network, Inc., a Nevada corporation, ("AEN") and David L. Kahn aver as follows:

JURISDICTION/VENUE

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. Sections 1331 and 1332.

1. Plaintiffs are informed and believe that Defendant AT&T Corp., doing business as American Telephone and Telegraph Company, and/or AT&T (a New York Corporation, with its principal place of business in New Jersey) ("AT&T") is found in, and transacts business in, the Central District of California.

2. Performance of the agreements between AT&T and AEN that are the subject of this action has occurred, and continues to occur, in the Central District of California.

3. Jurisdiction is also founded on 15 U.S.C. Sections 4, 15 and 47 U.S.C. Sections 206, 207, with pendant jurisdiction of the state law claims.

4. Venue is proper under 28 U.S.C. §§ 1391(c).

THE PARTIES AND THEIR BUSINESSES

5. Audio Entertainment Network, Inc. a Nevada corporation ("AEN"), is a corporation duly authorized under the laws of the State of Nevada.

6. AEN has in the past offered to telephone information service providers ("IP's") both AT&T "900 tariffed transport services", and the associated AT&T billing and collection services for the same 900 telephone numbers. AEN also acts as an IP itself. The term "900 tariffed transport services", refers to AT&T's basic utility or telecommunications services which provides for AT&T's transmission of the 900 telephone call from the caller's telephone to AEN's facility. Pursuant to AT&T's 900 billing and collection services for the same 900 telephone numbers, the calling party is charged a premium rate selected by AEN (or other IP) for each call made to each of AEN's 900 telephone numbers; which rate is higher than the rate the caller would be charged for making an ordinary long-distance call. The total charges to the caller (which are paid to AEN, and other IP's, by AT&T after deducting AT&T's transport and billing and collection charges) are for the access to the information provided by AEN, or other IP. Examples of such pay-per-call services include sports scores, computer dating "bulletin boards", stock market quotes, weather data, etc.

7. On or about February 2, 1995 AEN sold all of its assets pursuant to a bulk sale to David Kahn, who is a citizen of California, and resides in Los Angeles, California.

8. Plaintiffs are informed and believe, and on that basis allege, that AT&T was at all relevant times herein a corporation authorized to do business, and was conducting business, in the State of California.

9. AT&T is principally engaged in the business of providing interstate and intrastate common carrier communications services throughout the United States and the

world. In conjunction with its menu of such offerings, AT&T offers 900 tariffed transport services and the contractually "tied" (through Sections 6 and 7.E. of AT&T's Billing Services Agreement) 900 billing and collection services for the same 900 number. AT&T's 900 billing and collection services involve the transmission of a billing statement to the caller, generally through a local telephone company, and the assumption of the responsibility for receiving and responding to billing error complaints or inquiries. It also involves the collection of the monies due from the callers of the 900 telephone numbers. Thus, AT&T not only makes available the telephone transmission services (i.e. the tariffed transport services, also known as the utility or telecommunication services) for the 900 telephone numbers, but AT&T also provides the contractually "tied" (through Sections 6 and 7.E. of AT&T's Billing Services Agreement) billing and collection services for such 900 telephone numbers to its customers, including service bureaus and IP's, such as AEN. Additionally, AT&T's provision of interstate common carrier tariffed transport services for 900 telephone numbers is regulated by the Federal Communications Act and the tariffs filed thereunder.

AT&T'S BILLING AND COLLECTION SERVICES AND AT&T'S TARIFFED TRANSPORT SERVICES FOR 900 NUMBERS ARE INEXTRICABLY TIED TOGETHER BY AT&T

10. AT&T's billing and collection services are offered by AT&T only through a "Billing Services Agreement" ("BSA"), such as Contract No. 200060 QJ executed in August, 1991 ("AEN BSA"). As AEN (and other

IP"s) added additional 900 telephone numbers to the AEN BSA (or other BSA), AT&T would typically do so by means of a "Billing Services Agreement Additional Page".

11. Pursuant to a FCC decision, AT&T's provision of billing and collection services for 900 telephone numbers is not now directly regulated by the Federal Communications Commission, even though it is a service "for or in connection with" common carrier "communication services" under Sections 201, 202, et. seq. of the Federal Communications Act. However, because AT&T's 900 billing and collection services are "for or in connection with" common carrier "communication services' pursuant to such Sections, they are subject to the Federal Communications Act.

12. AT&T's billing and collection services are also "for or in connection with" AT&T's tariffed transport services (i.e., "communications services") because AT&T's billing and collection services for each and every particular AEN 900 telephone number are tied to AT&T's tariffed transport services for each such 900 telephone number (i.e., once AT&T ceases billing and collection services for a particular 900 telephone number, AT&T refuses to thereafter provide tariffed transport services for that 900 telephone number); even though AT&T's Tariff provides that AT&T's 900 transport services includes the 900 telephone number.

13. The relevant provisions in the AEN BSA (and other BSA's) are:

> 6. . . . Upon termination of this Agreement, AT&T will assign you a different telephone

> number(s) if you elect to continue Network Services." [i.e., tariffed transport services].
> "7.E. This agreement will automatically terminate if you do not activate Network Service for the AT&T MultiQuest ...offer(s) described in this Agreement within 90 days of original 900 telephone number assignment."

14. Even though Section 6 of AEN's BSA is (and other BSA's are) expressly applicable only "upon termination of this Agreement", AT&T applied it whenever any particular 900 program under the AEN BSA (or other BSA) was terminated, even though the AEN BSA (or other BSA) itself was not terminated as required by the BSA. Thus upon AT&T's termination of <u>any program</u> under the AEC BSA (or other BSA), AT&T refused to permit AEN (or other IP's) to keep the same 900 telephone number(s) in order for AEN (or other IP's) to continue to receive tariffed transport services on such 900 telephone number(s); even though AT&T's Tariff provides that AT&T's 900 transport services includes the 900 telephone number. AT&T refused to continue to provide tariffed transport services for AEN(or other IP's) after AT&T's billing services for a particular AEN (or other IP's) 900 telephone number was terminated, unless AT&T assigned a new 900 telephone number; even though AT&T's Tariff provides that AT&T's 900 transport services includes the 900 telephone number. Since the callers of such 900 telephone numbers were used to calling the existing 900 telephone numbers, this AT&T practice destroyed the value of AEN's (and other IP's) interests in such 900 telephone numbers.

15. As a result of these provisions (and virtually identical provisions in all of AT&T's other BSA's with other

customers) all of AT&T's 900 MultiQuest BSA customers must use AT&T's tariffed transport services (i.e., "Utility, or "Network Services"); then if the BSA is terminated by either party, for any reason whatsoever, AT&T's 900 customer loses its unique 900 numbers. The practical effects on information providers are very severe. After operations commence, the AT&T 900 information provider like AEN, cannot elect to use another billing service without losing its 900 telephone numbers, in which it has invested significant monies in promotion, and which are typically the only practical way for the 900 IP's customers to do business with the information provider, or to even be able to contact the information provider.

16. Thus, under paragraph 7.E of the AEN BSA (or other BSA's), the 900 information provider must use AT&T's Network [tariffed transport or utility] services. If an information provider like AEN, uses AT&T's tariffed 900 transport services, the information provider must continue to use AT&T billing services or lose its unique 900 numbers; in which the customer, such as AEN, typically will have invested substantial sums. The effects of these provisions in the AEN BSA (and other BSA's) are to "tie" AT&T's tariffed 900 transport services to its 900 billing services for the information provider's life, and to prevent AT&T customers (like AEN) from utilizing billing services of AT&T's competitors.

AT&T IS AN ESSENTIAL FACILITY TO ITS 900 TELEPHONE NUMBER CUSTOMERS

17. As set forth above, from at least August, 1991 and continuing thereafter AT&T tied its provision of billing

and collection services for 900 telephone numbers to AT&T's provision of tariffed transport services on those same 900 telephone numbers, even though the provision of such different services was governed by different contracts; and even though the provision of tariffed transport services was governed by AT&T's Tariff, which provided that the tariffed transport services included the 900 telephone number. Thus, AT&T claimed and exercised its alleged "right" to terminate billing services for certain 900 telephone numbers so as to also terminate its customers', including AEN's (and AEN's customer's) rights, to continue to use the same 900 telephone numbers for which AT&T had agreed to provide tariffed transport services. AT&T terminated the use of the same 900 telephone numbers in such situations even though (i) AEN and other customers had spent substantial sums of money in advertising such 900 numbers, (ii) such 900 numbers were frequently the only practical way for the customers of such numbers to do business with AEN (and/or AEN's customers) and other IP's, or to even contact AEN (or other IP's), and (iii) such termination was of no useful benefit to AT&T other than to exact a penalty from the users of such 900 numbers, such as AEN, AEN's customers, and the callers of such 900 numbers.

18. Even though other companies such as MCI and Sprint from about 1989 also provided tariffed transport services for 900 numbers, there was no competition for such services for any particular 900 telephone number because AT&T and other carriers did not permit the portability of 900 telephone numbers from one carrier to another. Had 900 numbers been portable (or had AT&T not inextricably linked its provision of billing services for particular 900 telephone numbers to AT&T's provision of tariffed transport services

for such 900 telephone numbers), the cost of AT&T's 900 tariffed transport services (and/or of AT&T's 900 billing services) would have been reduced by at least 10% to AEN and other IP's.

19. From at least August, 1991 until present, AEN (and other IP's) and its customers have used particular 900 numbers continuously, and not just for one application.

20. On information and belief, AT&T's share of both the national tariffed transport services market and the national billing and collection services market for national 900 telephone numbers is approximately seventy percent (70%) of such markets. Such markets now total an estimated $650 million dollars annually. AEN's revenue from AT&T 900 telephone numbers and from servicing AT&T 900 numbers during some months exceeded $75,000 per month before AT&T commenced illegally terminating billing and collection services and tariffed transport services on AEN's 900 telephone numbers, as well as the 900 telephone numbers themselves.

21. Nothing in AT&T's 900 Tariff permits AT&T to terminate tariffed transport services for particular 900 numbers (or the 900 telephone number itself), because of AT&T's customers' alleged or actual violations of the BSA, or AT&T advertising or other AT&T Guidelines.

22. Because of AT&T's practices of tying 900 tariffed transport services to 900 billing services, and terminating customers' use of 900 numbers whenever a billing services agreement is terminated (or even when billing services for a program under a BSA is terminated), and

because 900 numbers are not portable to another common carrier, AT&T is an essential facility to its 900 telephone number customer.

AT&T'S TERMINATION OF 900 SERVICES BREACHED THE BSA AND/OR VIOLATED THE FEDERAL COMMUNICATIONS ACT.

23. Commencing in late 1991 and/or 1992 AT&T on many occasions terminated billing and collection services (as well as AT&T's linked tariffed transport services) on numerous AEN (and other IP's) 900 telephone numbers on the alleged grounds that (i) "the advertising for theses lines contained implicit and explicit sexual references", and/or (ii) AT&T's guidelines were allegedly violated, and/or (iii) the preambles were not approved by AT&T, and/or (iv) the statement of caller prices were not approved by AT&T and/or were not in accordance with AT&T's Guidelines. Such terminations breached the AEN BSA (and other BSA's) and/or violated the Federal Communications Act for the following reasons:

A. On information and belief, some of the allegedly objectionable advertising did not even refer to AT&T's 900 numbers; instead it referred to other telephone numbers, which were not AT&T 900 programs.

B. On information and belief, some of the allegedly objectionable advertising was neither "sexually explicit or implicit".

C. Frequently AT&T's termination letters to AEN (and other IP's) referred to AT&T's Guidelines as

justification for AT&T's refusal to provide billing and collections services (and tariffed transport services on AEN's [and other IP's] 900 telephone numbers) because of advertising allegedly containing "implicit or explicit sexual references". In fact, what AT&T's Guidelines prohibited were ". . . explicit or implicit descriptions of violence or sexual conduct. . ." (Emphasis added.)

D. AT&T's Guidelines were not part of the AEN BSA because they were not signed by AEN (and other IP's) as required by paragraph 18.A.

E. There was no provision in the AEN BSA (or other BSA's), or in the Tariff, which permitted AT&T's termination of tariffed transport services on AEN's (or other IP's) 900 telephone numbers (or the 900 numbers themselves) just because AT&T terminated billing services on one or more of AEN's (or other IP's) 900 programs; regardless of the reason for AT&T's termination of such billing services.

F. Commencing on or about April, 1992 AEN submitted to AT&T, in writing, AEN's proposed preambles to certain programs for AT&T's approval. At the same time, AEN requested in writing that AT&T ". . . confirm that. . . [such preambles] meet AT&T's current Guidelines, or what changes we should make in order to meet such guidelines". AT&T never even responded to AEN's proposed preambles, or even to AEN's letter requesting confirmation that AEN's preambles met AT&T' s Guidelines, or what changes should be made in order to meet such Guidelines. Instead, AT&T terminated certain of AEN's 900 telephone programs (including tariffed transport services for such programs) in or about June, 1993 on the ground, inter alia,

that AEN's preambles on those programs were not approved by AT&T and/or violated AT&T's Guidelines.

G. In 1992 and/or 1993 AEN submitted advertisements for certain of its 900 programs to AT&T for AT&T's approval. AT&T refused to even respond to AEN's requests for advertising approval. Instead, however, in or about June, 1993 AT&T terminated certain of AEN's 900 telephone programs (including tariffed transport services for such programs) on the ground, inter alia, that the advertising for such programs was not approved by AT&T.

H. In 1992 and/or 1993 AEN requested that AT&T change the price of certain of AEN's 900 programs from a flat charge per call to a per minute charge. AT&T refused to even respond to AEN's requests. Instead, however, in or about June, 1993 AT&T terminated certain of AENs 900 telephone programs (including tariffed transport services for such programs) on the ground, intra alia, that this violated AT&T's Guidelines since the calls were advertised at $2.00 per minute with a ten minute minimum whereas the actual price of the call was $19.95 (or $0.05 less per call than the $20.00 charge for a minimum ten minute call at $2.00 per minute).

I. AT&T discriminated against AEN by favoring certain service bureaus and/or information providers by (i) canceling AT&T scheduled terminations (for alleged violation of AT&T Guidelines and/or other reasons) of 900 telephone number billing, collection, and transport services for certain favored service bureaus and/or information providers, and/or by (ii) reactivating billing, collection and transport services for 900 telephone numbers that had been terminated by AT&T

(for alleged violations of AT&T Guidelines and/or other reasons) for certain favored service bureaus and/or information providers; all in violation of the Federal Communications Act. In addition, AT&T also discriminated against AEN by permitting certain favored service bureaus and/or information providers to continue to receive tariffed transport services on the same 900 telephone number that AT&T had terminated billing and collection services on for alleged violations of AT&T's Guidelines and/or other reasons.

24. AT&T's termination, upon termination of a BSA, of AT&T's billing and collection services, as well as AT&T's termination (at the same time) of AT&T's "tied" 900 tariffed transport services (including the 900 telephone numbers themselves) for AEN's (and other IP's) 900 telephone numbers violated the AEN BSA (and other BSA's) including, but not limited to, paragraphs 7.A., 7.B., 6., and 18.A. (and the terms and conditions implied pursuant to those Sections), violated the Federal Communications Act and the tariffs filed thereunder, violated the Federal Antitrust laws, and in some cases even violated Guidelines AT&T had published for the use of 900 numbers.

AT&T'S REFUSAL TO CHANGE THE TERMINATION POINT OF TARIFFED TRANSPORT SERVICES, REFUSAL TO TERMINATE UNWANTED AND UNNEEDED TARIFFED TRANSPORT SERVICES, AND REFUSAL TO ASSIGN BILLING SERVICES OR A BSA.

25. AT&T has refused to change the termination point of AEN's 900 telephone numbers (i.e., the termination point of AT&T's tariffed transport services from Reno, Nevada to Washington, D.C.). AT&T also initially refused for several months to change AEN's termination point from Reno to Las Vegas, even though such changes are routinely made by AT&T for other AT&T customers who compete with AEN.

26. More specifically, in May, 1992 AEN (while in Chapter 11) requested that AT&T change the termination point of AEN's tariffed transport services on AEN's 900 telephone numbers from Lo-Ad Communications in Reno, Nevada to Telecomputer Corporation in Washington, D.C. AT&T refused to do so. In addition, in 1994 AT&T refused for several months AEN's request that AT&T change the termination point of AEN's tariffed transport services from Zycom in Reno, Nevada to MRO Communications in Las Vegas, Nevada.

27. In addition, on at least one occasion in 1994 AT&T changed the termination point of AEN's tariffed transport services without AEN's consent (or even prior notice) from MRO Communications, Inc. in Las Vegas to Zycom in Reno.

28. § 12 of the AEN BSA specifically states in relevant part: "This agreement does not govern or affect tariffed services." AEN's requested termination of unwanted and unneeded tariffed transport services, and AEN's requested change in the termination point of tariffed transport services for AEN's 900 telephone numbers are requests for changes in tariffed transport services; and tariffed transport

services (including the particular 900 number) are not governed by the AEN BSA, but rather by the applicable tariff, the Federal Communications Act, and/or the Bankruptcy Code.

29. From February, 1995 through the filing date of this First Amended Complaint, AT&T unreasonably refused to consent to the assignment or transfer of billing services, or a BSA, from AEN to MicroVoice Applications, Inc.

30. Notwithstanding any Chapter 11 filing, AT&T is prohibited by the Bankruptcy Code and the Federal Communication Act from refusing to terminate unwanted and unneeded 900 tariffed transport services, and from denying AEN tariffed transport services (including the particular 900 number) for AEN's 900 telephone numbers in Washington, D.C., Las Vegas, or elsewhere in the U.S. AT&T is also prohibited by Section 16 of the AEN BSA from unreasonably refusing to consent to the assignment of such BSA and/or billing services, and by the Federal Communications Act from denying AEN (or its assignees) billing and/or tariffed transport services for AEN's 900 telephone numbers at another location in the U.S.

AT&T'S DUPLICATE AND BOGUS CHARGEBACKS.

31. On information and belief, AT&T frequently charged back to AEN (and other IP's) from April, 1992 through April, 1995 (i.e., subtracted from the monies it paid to AEN) duplicate and bogus chargebacks. Duplicate chargebacks are chargebacks that AT&T deducted more than once from monies due AEN (and other IP's). Bogus chargebacks are chargebacks that AT&T deducted from

monies due AEN (and other IP's) (i) for 900 calls that AEN (and other IP's) never received credit for, or (ii) for other reasons that cannot be substantiated or supported by AT&T.

32. The amount of AT&T's duplicate and bogus chargebacks from April, 1992 through April, 1995 has not yet been determined.

FIRST CLAIM FOR RELIEF

(Breach of Contract)

33. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

34. Pursuant to the terms of the AEN BSA (and other BSA's), AT&T agreed to bill and collect monies from the individuals who call AEN's (and other IP's) 900 numbers and remit to AEN (and other IP's) all monies billed less certain specified deductions.

35. As compensation for providing billing and collection services, AT&T received approximately $.30 per minute (based on an estimated average price per call of $3.00 per minute) on each and every 900 call made by each and every caller. These monies were deducted by AT&T from the monies due and owing to AEN (and other IP's).

36. AEN has (and other IP's have) performed all the terms, conditions and covenants on its part to be performed pursuant to the terms of the AEN BSA (and other BSA's).

37. Commencing August, 1991 and continuing through the filing of this Complaint, AT&T has breached the terms of the AEN BSA, and other BSA's, (including, but not limited to, Sections 1.A., 1.B., 2.A., and 3.A. and the terms and conditions implied pursuant to those Sections) by continuously failing and refusing to properly bill and collect monies from callers and forward said monies to AEN (and other IP's). AT&T's breaches included, but are not limited to, AT&T failing to collect, and/or failing to use reasonable efforts, to collect monies from telephone calls made by callers for which the callers failed or refused to pay, in an amount not yet determined.

38. AT&T further breached the AEN BSA (and other BSA's) by charging AEN (and other IP's) for each and every call made by such callers and by failing and by refusing to credit AEN (and other IP's) for the approximate $.30 per minute AT&T transport services charges (or for the billing and collection charges) for calls (i) that AT&T failed to make reasonable efforts to collect, and/or (ii) that were not made (e.g., "deny all knowledge" calls) in breach of the AEN BSA (and other BSA's), including but not limited to, Sections 1.A., 1.B., 2.A., and 3.A. and the terms and conditions implied pursuant to those Sections.

39. AEN has (and other IP's have) demanded that AT&T account for, and refund, the monies which AT&T has failed to collect, and/or failed to use reasonable efforts to collect, and the $.30 per minute AT&T transport charge (as well as the billing and collection charge) for each call which the caller has failed to pay and which callers state were never made (e.g., the callers "denied all knowledge" of the alleged

900 call), and/or for each call which AT&T failed to use reasonable efforts to collect.

40. As a proximate result of AT&T's acts, Plaintiffs have been damaged in an amount not yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of the damages has been determined.

SECOND CLAIM FOR RELIEF

(Breach of Contract)

41. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

42. In or about August 1991 AT&T agreed to provide AEN with tariffed transport services for 900 telephone numbers, whereby AT&T would provide AEN with various 900 numbers in order to allow AEN to operate a 900 telephone business and a service bureau for other individuals and entities who wished to participate in the 900 telephone business.

43. Pursuant to the terms of the applicable tariff, AEN agreed to pay $500 for the first 900 telephone number and $125 for each the next forty-nine (49) 900 telephone numbers. After the first fifty (50) 900 telephone numbers, AT&T agreed not to charge AEN any monies for a 900 telephone number, assuming the average charges collected by AT&T on all of AEN's 900 telephone numbers averaged $125 per month. This "average" was determined by adding up AT&T's approximate $.30 per minute charges to AEN for

each 900 telephone call for each month and dividing by the number of AEN's 900 telephone numbers.

44. Pursuant to the applicable tariff, each month AEN paid to AT&T the sum of $6,750.00 for the first fifty (50) 900 telephone numbers; or if less than fifty (50) 900 telephone numbers were operating, $500 for the first 900 number and $125 for each of the next forty nine (49) 900 numbers. This money was to be applied in determining whether the monthly amount received by AT&T averaged $125 per 900 telephone number.

45. AEN has performed all the terms, conditions and covenants on its part to be performed pursuant to the terms of the tariff and AEN's contracts with AT&T.

46. Commencing February, 1992, and continuing for approximately a year to eighteen (18) months thereafter, AT&T breached the terms of its tariff and its contracts with AEN, including the AEN BSA by:

A. Failing to allow AEN to add, or (until mid 1994) even to terminate, 900 telephone numbers (and/or programs) and/or change caller prices, in order to meet the required $125 per 900 telephone number average; and

B. By failing to give AEN (and other IP's) credit for AEN's (or other IP's) monthly payment of $6,750.00 for the first fifty (50) 900 telephone numbers, or any lesser minimum monthly amounts paid by AEN (or other IP's) for tariffed transport services for 900 telephone numbers.

47. A. Plaintiffs have repeatedly demanded that AT&T allow AEN to add, and (through mid-1994) to terminate 900 telephone numbers (and/or programs) and/or to change caller prices, in order to meet AT&T's $125 monthly per 900 telephone number average.

B. AEN has (and other IP's have) further demanded that AT&T provide AEN (and other IP's) with a credit for the $6,750.00 paid by AEN (and other IP's) to AT&T each month, or any lesser minimum monthly amounts paid by AEN (and other IP's) for tariffed transport services for 900 telephone numbers. AT&T has refused to comply with such AEN (and other IP's) demands.

48. As a proximate result of AT&T's acts, Plaintiffs have been damaged in an amount not yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of the damages has been determined.

THIRD CLAIM FOR RELIEF

(Breach of Contract)

49. Plaintiffs reallege and reincorporate paragraphs 1 through 9 herein as though set forth in full.

50. As hereinabove averred, AT&T's acts in terminating billing and collection services and tariffed transport services for AEN's 900 numbers (paragraphs 10 through 24), and other IP's 900 numbers (paragraphs 10 through 22, 23 E., 24), was a breach of contract, including, but not limited to, Sections 1.A., 1.B., 12, 7.B., 6., 18.A.,

18.F. of the AEN BSA (and other BSA's), and the terms and conditions implied pursuant to those Sections.

51. Plaintiffs have performed all the terms, conditions and covenants on its part to be performed under said contract(s) with AT&T.

52. Said breach of contract(s) damaged Plaintiffs in an amount not yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

FOURTH CLAIM FOR RELIEF

(Breach of Contract)

53. Plaintiffs reallege and reincorporate paragraphs 1 through 24 herein as though set forth in full.

54. As hereinabove averred in paragraphs 25-30, AT&T's refusal to change the termination point of AEN's tariffed transport services for AEN's 900 numbers and refusal to assign billing services (or a BSA), was a breach of contract, including, but not limited to, Sections 12. and 16. of the AEN BSA, and the terms and conditions implied pursuant to those Sections and/or pursuant to AT&T's conduct and/or course of dealing.

55. Plaintiffs have performed all the terms, conditions and covenants on its part to be performed under said contract with AT&T.

56. Said breach of contract damaged Plaintiffs in an amount not yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

FIFTH CLAIM FOR RELIEF

(Breach of Contract)

57. Plaintiffs reallege and reincorporate paragraphs 1 through 30 herein as though set forth in full.

58. As hereinabove averred in paragraphs 31-32, AT&T's acts in deducting from monies paid to AEN (and other IP's) duplicate and bogus chargebacks was a breach of contract, including, but not limited to, Sections 1.A., 1.B., 2.A., and 3.A. of the AEN BSA (and other BSA's), and the terms and conditions implied pursuant to those Sections.

59. AEN has (and other IP's have) performed all the terms, conditions and covenants on its (their) part to be performed under said contract(s) with AT&T.

60. Said breach of contract(s) damaged Plaintiffs in an amount not yet determined.

SIXTH CLAIM FOR RELIEF

(Breach of Contract)

61. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

62. The agreement(s) between AEN (and other IP's) and AT&T contained express and implied provisions that AT&T bore the risks for all "uncollectibles" and for "chargebacks" that occurred more than 60 days after the close of billing.

63. AEN (and other IP's) had a right not to be assessed chargebacks for calls that the callers refused to pay or disputed more than sixty (60) days after the month in which calls were made; and such chargebacks were not authorized by the AEN BSA (and other BSA's).

64. Similarly, AEN (and other IP's) had a right to have AT&T bear the entire risk for uncollectibles under the AEN BSA (and other BSA's) to the extent that AT&T had already paid AEN (and other IP's) for uncollectible calls.

65. Section 3.B. of the AEN BSA (and other BSA's) allocates the risk of uncollectibles (to the extent that AT&T had already paid AEN [and other IP's] for them) between AEN (and other IP's) and AT&T to a pre-determined percentage of total billings.

66. Since there was no pre-determined percentage specified for the "uncollectible discount rate" in the AEN BSA (and other BSA's), the responsibility for such "uncollectible" amounts was allocated fully to AT&T.

67. Thus, Section 1.B. of the AEN BSA (and other BSA's) states in relevant part that "AT&T will remit collected charges to [AEN] . . . less any fees as indicated in this Agreement" (Emphasis added.) Section 3. B. of the AEN BSA (and other BSA's) states in relevant part:

> "AT&T may change the billing implementation fee and/or adjust the uncollectible discount rate to reflect AT&T's then current estimate of collectibles upon thirty (30) days notice." (Emphasis added.)

Thus, under the AEN BSA (and other BSA's), uncollectibles (to the extent that AT&T had already paid for them) are not to be accounted for separately and then deducted or charged back to the IP.

68. The uncollectible pre-determined percentage could change pursuant to the AEN BSA (and other BSA's) only prospectively, and only if AT&T were to give AEN (and other IP's) thirty (30) days prior written notice that AT&T was adjusting the uncollectible discount rate.

69. Absent such notice, the AEN BSA (and other BSA's) did not provide for AT&T's pass-through to AEN (or other IP's) of such uncollectibles. Furthermore, the AEN BSA does (and other BSA's do) not provide for the pass-through of "chargebacks" to AEN (or other IP's) that occurred more than sixty (60) days after the close of billing.

70. Section 3.A of the AEN BSA (and other BSA's) provided that AT&T would remit to the IP the amount due sixty days after each set of caller bills was mailed. The net amount remitted to AEN (and other IP's) was intended to be a final figure upon which AEN (and other IP's) could rely as a settlement of the billing period ending two months earlier.

71. Thus AEN (and other IP's) bore the risk of "chargebacks" that occurred within 60 days after the close of each billing period, and AT&T bore the risks for all "uncollectibles" and for "chargebacks" that occurred more than 60 days after the close of billing.

72. AT&T breached its agreement(s) with AEN, and other IP's, (including, but not limited to, Sections 1.B., 3.A. and 3.B. of the AEN BSA, and other BSA's) when AT&T unilaterally and retroactively shifted to AEN (and other IP's) the risks for (i) uncollectibles already paid to AEN (and other IP's), and (ii) more-than-sixty-day-old chargebacks.

73. Due to AT&T's above breaches of contract, Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

SEVENTH CLAIM FOR RELIEF

(Tortious Breach of Implied Covenant of Good Faith and Fair Dealing)

74. Plaintiffs reallege and reincorporate paragraphs 1 through 9 herein as though set forth in full.

75. The agreement(s) between AEN (and other IP's) and AT&T contain an implied covenant of good faith and fair dealing under which AT&T may not act in bad faith so as to destroy or injure the right of AEN (and other IP's) to receive the fruits of such agreements.

76. As hereinbefore alleged, AT&T's termination of 900 billing and collection, tariffed transport, and other services was in bad faith and in opposition to AEN's rights (paragraphs 10 through 24), and other IP's rights (paragraphs 10 through 22, 23 E., 24), and justified expectations to receive the fruits of their Agreements.

77. Due to AT&T's breach of the implied covenant of good faith and fair dealing Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

EIGHTH CLAIM FOR RELIEF

(Tortious Breach of Implied Covenant of Good Faith and Fair Dealing)

78. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

79. The agreement(s) between AEN (and other IP's) and AT&T contain an implied covenant of good faith and fair dealing under which AT&T may not act in bad faith so as to destroy or injure the right of AEN (and other IP's) to receive the fruits of such agreements.

80. As hereinbefore alleged in paragraphs 34 through 39 AT&T's failure to make reasonable efforts to collect 900 telephone charges and AT&T's billing of AEN (and other IP's) for billing and collection (as well as transport) charges for calls (i) that AT&T failed to make reasonable efforts to collect, and/or (ii) that were not made

(e.g., "deny all knowledge" calls) was in bad faith and in opposition to AEN's (and other IP's) rights and justified expectations to receive the fruits of their Agreements.

81. Due to AT&T's breach of the implied covenant of good faith and fair dealing Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

NINTH CLAIM FOR RELIEF

(Tortious Breach of Implied Covenant of Good Faith and Fair Dealing)

82. Plaintiffs reallege and reincorporate paragraphs 1 through 24 herein as though set forth in full.

83. The agreement between AEN and AT&T contain an implied covenant of good faith and fair dealing under which AT&T may not act in bad faith so as to destroy or injure the right of AEN to receive the fruits of such agreements.

84. As hereinbefore alleged in paragraphs 25 through 30 AT&T's refusal to change the termination point of AEN's tariffed transport services (and AT&T's refusal to assign billing services or a BSA) was in bad faith and in opposition to AEN's rights and justified expectations to receive the fruits of their Agreements.

85. Due to AT&T's breach of the implied covenant of good faith and fair dealing Plaintiffs have been damaged in

an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

TENTH CLAIM FOR RELIEF

(Tortious Breach of Implied Covenant of Good Faith and Fair Dealing)

86. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

87. The agreement between AT&T and AEN (and other IP's) contain an implied covenant of good faith and fair dealing under which AT&T may not act in bad faith so as to destroy or injure the right of AEN (and other IP's) to receive the fruits of such agreements.

88. As hereinbefore alleged in paragraphs 42 through 48 AT&T's (i) failure to permit AEN to add, or (until mid 1994) even to terminate, 900 telephone numbers (and/or programs) and/or to change caller prices, in order to meet AT&T's required $125 monthly per 900 telephone number average, and (ii) AT&T's failure to give AEN (and other IP's) credit for AEN's (or other IP's) monthly payment of $6,750.00 for the first fifty (50) 900 telephone numbers, or any lesser minimum monthly amounts paid by AEN (or other IP's) for tariffed transport services for 900 telephone numbers, was in bad faith and in opposition to Plaintiffs' rights and justified expectations to receive the fruits of their Agreements.

89. Due to AT&T's breach of the implied covenant of good faith and fair dealing Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

ELEVENTH CLAIM FOR RELIEF

(Tortious Breach of Implied Covenant of Good Faith and Fair Dealing)

90. Plaintiffs reallege and reincorporate paragraphs 1 through 9 herein as though set forth in full.

91. The agreement(s) between AEN (and other IP's) and AT&T contain an implied covenant of good faith and fair dealing under which AT&T may not act in bad faith so as to destroy or injure the right of AEN (and other IP's) to receive the fruits of such agreements.

92. As hereinbefore alleged, AT&T's refusal to provide AEN (paragraphs 10 through 24), and other IP's (paragraphs 10 through 22, 23 E., 24), with tariffed transport services after AT&T terminated billing services on a 900 program (or even a BSA), unless AT&T changed the 900 telephone number was in bad faith and in opposition to AEN's (and other IP's) rights and justified expectations to receive the fruits of their agreements.

93. Due to AT&T's breach of the implied covenant of good faith and fair dealing Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of

this Court to amend this First Amended Complaint when the amount of such damages has been determined.

TWELFTH CLAIM FOR RELIEF

(Breach of Contract)

94. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full

95. The agreement(s) between AEN (and other IP's) and AT&T contained express and implied provisions that AT&T bore the risks for all "uncollectibles" and for "chargebacks" that occurred more than sixty (60) days after the close of billing.

96. AEN (and other IP's) had a right not to be assessed chargebacks for calls that the callers refused to pay or disputed more than sixty (60) days after the month in which calls were made; and such chargebacks were not authorized by the AEN BSA (and other BSA's).

97. Similarly, AEN (and other IP's) had a right to have AT&T bear the entire risk for uncollectibles under the AEN BSA (and other BSA's) to the extent that AT&T had already paid AEN (and other IP's) for uncollectible calls.

98. Section 3.B. of the AEN BSA (and other BSA's) allocates the risk of uncollectibles (to the extent that AT&T had already paid AEN, or other IP's, for them) between AEN (and other IP's) and AT&T to a pre-determined percentage of total billings.

99. Since there was no pre-determined percentage specified for the "uncollectible discount rate" in the AEN BSA (and other BSA's), the responsibility for such "uncollectible" amounts was allocated fully to AT&T.

100. Thus, Section 1.B. of the AEN BSA (and other BSA's) states in relevant part that "AT&T will remit collected charges to [AEN, or other IP] . . . less any fees as indicated in this Agreement" (Emphasis added.) Section 3 B. of the AEN BSA (and other BSA's) states in relevant part:

> "AT&T may change the billing implementation fee and/or adjust the uncollectible discount rate to reflect AT&T's then current estimate of collectibles upon thirty (30) days notice." (Emphasis added.)

Thus, under the AEN BSA (and other BSA's), uncollectibles (to the extent that AT&T had already paid for them) are not to be accounted for separately and then deducted or charged back to AEN (and other IP's).

101. The uncollectible pre-determined percentage could change pursuant to the AEN BSA (and other BSA's) only prospectively, and only if AT&T were to give AEN (and other IP's) thirty (30) days prior written notice that AT&T was adjusting the uncollectible discount rate.

102. Absent such notice, the AEN BSA did (and other BSA's do) not provide for AT&T's pass-through to AEN (or other IP) of such uncollectibles. Furthermore, the AEN BSA does (and other BSA's do) not provide for the pass-through of "chargebacks" to AEN (or other IP's) that

occurred more than sixty (60) days after the close of the billing month.

103. Section 3.A of the AEN BSA (and other BSA's) provided that AT&T would remit to AEN (or other IP's) the amount due sixty (60) days after each set of caller bills was mailed. The net amount remitted to AEN (and other IP's) was intended to be a final figure upon which AEN (and other IP's) could rely as a settlement of the billing period ending two months earlier.

104. Thus AEN (and other IP's) bore the risk of "chargebacks" that occurred within 60 days after the close of each billing period, and AT&T bore the risks for all "uncollectibles" and for "chargebacks" that occurred more than 60 days after the close of billing.

105. Notwithstanding the foregoing contractual provisions, AT&T unilaterally, and retroactively, shifted to AEN (and other IP's) the risks for (i) uncollectibles already paid to AEN (and other IP's), and (ii) more-than-sixty-day-old chargebacks; even though the AEN BSA does (and other BSA's do) not provide for either (i) the pass-through of "chargebacks" to AEN (or other IP's) that occurred more than sixty (60) days after the close of the billing month, or (ii) the pass-through of chargebakcs to AEN (or other IP's) for uncollectibles already paid to AEN (or other IP's).

106. Due to AT&T's above actions AT&T is estopped to deny liability for AT&T's actions, and the damages resulting therefrom. The amount of Plaintiffs' damages have not yet been ascertained. Plaintiffs will seek

leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

THIRTEENTH CLAIM FOR RELIEF

(Interference with Prospective Economic Advantage)

107. Plaintiffs reallege and reincorporate paragraphs 1 through 32, herein as though set forth in full.

108. AT&T interfered with AEN's business relationships and prospective economic advantages with MRO Communications, Inc., and/or, with M.C. Products, Inc., thereby causing AEN to lose revenue in an amount not yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined. Such interference includes, inter alia, AT&T's refusal to change the termination point of AT&T's tariffed transport services for 900 programs for AEN's customer, M.C. Products, Inc., from MRO Communications, Inc. in Las Vegas, Nevada to AEN's service bureau in Reno, Nevada. In 1991 and/or 1992, AT&T also unreasonably refused to consent to the assignment or transfer of billing services, or a BSA from MRO Communications, Inc. (for M.C. Products, Inc.) to AEN. Such actions by AT&T were contrary to the Federal Communications Act and to the implied covenant of good faith and fair dealing in the AEN BSA.

FOURTEENTH CLAIM FOR RELIEF

(Antitrust Laws 15 U.S.C. §§ 1, 2)

109. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

110. The acts of AT&T herein set forth constitute unreasonable restraints of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, and monopolization and attempts to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

111. Plaintiffs sustained damages as a result of AT&T's violation of the Sherman Act for excess tariff (and/or billing and collection) charges, and for lost revenue; in an amount not yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

FIFTEENTH CLAIM FOR RELIEF

(Violation of the Federal Communications Act 47 U.S.C. §§ 201, 202.)

112. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

113. The acts of AT&T herein set forth violated Sections 201 and 202 of the Federal Communications Act, 47 U.S.C. Sections 201, 202 in that AT&T failed to provide tariffed and related services (including billing and collection services and the use of particular 900 telephone numbers) in

a just and reasonable manner and on a non-discriminatory basis; and caused Plaintiffs damages in an amount not yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amounts of such damages have been determined. Those acts include, but are not limited to:

A. Terminating tariffed transport services on AEN's (and other IP's) particular 900 telephone numbers, billing and collection services on AEN's (and other IP's) 900 telephone numbers, and the 900 telephone numbers of AEN, and other IP's (and AEN's, and other IP's, customers);

B. Refusing to change the termination point of AEN's tariffed transport services on AEN's 900 telephone numbers (from Reno, Nevada to Washington, D.C.). AT&T also initially refusing to change the termination point of AEN's tariffed transport services on AEN's existing 900 telephone numbers from Reno to Las Vegas;

C. Refusing to permit other AT&T customers of record to terminate their 900 telephone numbers at AEN's facility or at AEN's service bureau;

D. Changing the termination point of AEN's tariffed transport services without AEN's permission; and

E. Discriminating against AEN as set forth in paragraph 23 I.

SIXTEENTH CLAIM FOR RELIEF

(Accounting)

114. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

115. Beginning on or about August, 1991 and continuing on through and until the date of this First Amended Complaint, and in the course and scope of their duties to AEN (and other IP's), AT&T has received monies and used assets all of which belong to the Plaintiffs herein (including, but not limited to):

A. By deducting from monies paid to AEN (and other IP's) duplicate and bogus chargebakcs;

B. By failing to collect for 900 calls allegedly made by callers to AEN's (and other IP's) 900 telephone numbers (e.g. "deny all knowledge" calls, which AT&T contends were in fact made to AEN's and other IP's, 900 telephone numbers) and/or failing to use reasonable efforts to collect;

C. By deducting from monies paid to AEN (and other IP's) billing and collection charges and tariffed transport services charges for calls not made to AEN's (and other IP's) 900 telephone numbers (e.g., "deny all knowledge" calls allegedly made to AEN's, and other IP's, 900 telephone numbers), and for calls which AT&T failed to use reasonable efforts to collect; and

D. By giving and/or permitting credits and/or refunds to 900 callers not authorized by the AEN BSA (and other BSA's) and charging them back to AEN (and other IP's) and/or failing to pay AEN (and other IP's) for such credits and/or refunds.

116. The amount of money due from AT&T is unknown at this time and cannot be ascertained without a full accounting of the receipts and disbursements thereof.

117. Plaintiffs have demanded that AT&T account for Plaintiffs' assets and for monies collected on Plaintiffs' behalf, and for AT&T's deductions from Plaintiffs' monies, but AT&T has failed and refused to do so and continues to fail and refuse to do so, or to pay over any of the sums due to Plaintiffs.

SEVENTEENTH CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing)

118. Plaintiffs reallege and reincorporate paragraphs 1 through 32 herein as though set forth in full.

119. A. AT&T has deducted sums of money which AT&T contends is due and owing to AT&T as a result of AEN not meeting the $125 per line average for certain months, despite the fact that AT&T has failed and refused to allow any activity on AEN's account during the time period that AEN was in a bankruptcy proceeding and for some time thereafter; except that eventually in mid 1994 AT&T

permitted AEN to delete unneeded number and unwanted 900 telephone numbers.

B. In addition, AT&T has failed to give AEN credit for AEN's monthly payment of $6,750.00 for the first fifty (50) AEN 900 telephone numbers, or any lesser minimum monthly amounts paid by AEN for tariffed transport services for 900 telephone numbers.

120. Due to AT&T's above breaches of the implied covenant of good faith and fair dealing, Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

EIGHTEENTH CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing)

121. Plaintiffs reallege and reincorporate paragraphs 1 through 9 herein as though set forth in full.

122. As hereinbefore alleged, AT&T's termination of 900 billing and collection, tariffed transport, and other services to AEN (paragraphs 10 through 24), and other IP's (paragraphs 10 through 22, 23 E., 24), was in bad faith.

123. Due to AT&T's above breaches of the implied covenant of good faith and fair dealing, Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended

Complaint when the amount of such damages has been determined.

NINETEENTH CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing)

124. Plaintiffs reallege and reincorporate paragraphs 1 through 24 herein as though set forth in full.

125. As hereinbefore alleged in paragraphs 25 through 30 AT&T's refusal to change the termination point of AEN's tariffed transport services (and AT&T's refusal to assign billing services or a BSA) was in bad faith.

126. Due to AT&T's above breaches of the implied covenant of good faith and fair dealing, Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

TWENTIETH CLAIM FOR RELIEF

(Breach of Implied Covenant of Good Faith and Fair Dealing)

127. Plaintiffs reallege and reincorporate paragraphs 1 through 9 herein as though set forth in full.

128. As hereinbefore alleged, AT&T's refusal to provide AEN (paragraphs 10 through 24), and other IP's

(paragraphs 10 through 22, 23 E., 24), with tariffed transport services (including their 900 numbers) after AT&T terminated billing services on a program (or even a BSA), unless AT&T changed the 900 telephone number(s) was in bad faith.

129. Due to AT&T's breach of the implied covenant of good faith and fair dealing, Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

TWENTY-FIRST CLAIM FOR RELIEF

(Violation of Bankruptcy Code)

130. Plaintiffs reallege and reincorporate paragraphs 1 through 24 herein as though set forth in full.

131. As hereinbefore alleged in paragraphs 25 through 30 AT&T's (i) refusal to change the termination point of AEN's tariffed transport services, (ii) refusal to terminate AEN's unwanted and unneeded tariffed transport services, (iii) refusal to permit AEN to add new 900 numbers and/or programs, (iv) refusal to permit AEN to change prices of existing programs, and (v) refusal to assign AEN's billing services or a BSA; violated the Bankruptcy Code, including, but not limited to, Sections 362, 363, 366, 541, 542, and 543.

132. Due to AT&T's violations of the Bankruptcy Code, Plaintiffs have been damaged in an amount not as yet ascertained. Plaintiffs will seek leave of this Court to amend this First Amended Complaint when the amount of such damages has been determined.

TWENTY-SECOND CLAIM FOR RELIEF

(Class Action)

133. Plaintiffs reallege and reincorporate paragraphs 1 through 22, 23 E., 24, 31-32, 34-40, 50-52, 58-60, 62-73, 75-77, 79-81, 91-93, 95-106, 110-111, 113 A., 115-117, 122-123, 128-129 herein as though set forth in full.

134. Plaintiffs bring these claims for injunctive relief and for single and treble damages for Defendant's violations as herein averred pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all IP's in the United States (excluding Defendant AT&T, MCI, Sprint and their subsidiaries) who purchased 900 tariffed transport and billing and collection services from AT&T at any time during the period 1991 to date. This Action should be certified as a class action because:

(a) The class is so numerous that joinder of all members is impracticable.

(b) There are questions of law and fact common to the class.

(c) The claims of plaintiffs are typical of the claims of the class.

(d) The plaintiffs will fairly and adequately protect the interests of the class.

(e) AT&T has acted on grounds generally applicable to the class.

(f) Questions of law and fact (e.g., violations of the antitrust laws, the Federal Communications Act, and substantially the same form of AT&T contract) common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

135. The members of the class, including plaintiffs, purchased 900 tariffed transport services and billing and collection services from AT&T during the class period and sustained damages as averred herein.

WHEREFORE, Plaintiffs pray for judgment against AT&T as follows:

1. Judgment for damages in an amount not yet ascertained, for injuries Plaintiffs have suffered and will suffer as a result of AT&T's actions;

2. Punitive damage;

3. Treble damages, attorneys fees, costs and disbursements incurred in connection with this action;

4. Interest on the amount of judgment at the highest rate applicable by law;

5. An accounting for all assets and monies collected by AT&T on Plaintiffs' behalf;

6. Turnover of all monies wrongfully deducted and held by AT&T from monies due and owing Plaintiffs;

7. Judgment enjoining AT&T, its officers, directors, employees, agents, subsidiaries, parent companies, and all other persons or entities acting in concert with them, from improperly setting off alleged monies due in violation of Plaintiffs' agreement(s) with AT&T against revenues otherwise rightfully belonging to Plaintiffs, by reason of AT&T's material breaches of the agreement(s).

8. For single, treble, and punitive damages (and costs, disbursements and attorney's fees) to all class members arising from damages suffered by all class members, including but not limited to, excess charges for tariffed transport services and billing and collection services; and for an injunction (i) prohibiting the tying of tariffed transport services to billing and collection services, and (ii) prohibiting the termination of tariffed transport services to particular 900 numbers (and/or the 900 numbers themselves) upon the termination of AT&T billing services agreements.

9. For attorneys' fees and costs of suit incurred herein; and

10. For such other and further relief as the Court may deem just and proper.

DATED: August 25, 1995

Respectfully submitted,

ARCHER AND HANSON

By:/s/_____
RICHARD ARCHER
Attorney for Audio
Entertainment Network, Inc.,
a Nevada corporation and
David L. Kahn

APPENDIX K

U.S. District Court
Central District of California

CIVIL DOCKET FOR CASE #: 95-CV-3427

Audio Entertainment, et al v. AT&T Corp Filed: 05/22/95
Assigned to: Judge Laughlin E. Waters
Referred to: Discovery Carolyn Turchin

Demand: $0,000 Nature of Suit: 410
Lead Docket: None Jurisdiction: Federal Question
Dkt in other court: None

Cause: 15:15 Antitrust Litigation

AUDIO ENTERTAINMENT NETWORK, INC. a Nevada corporation
plaintiff

Richard J Archer
[COR LD NTC]
Archer & Hanson
Suite 213
1426 Fillmore Street
San Francisco, CA 94115
415-346-3552

David L Kahn
[C0R LD NTC]
David L Kahn Law Offices
535 N Hayworth Ave
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Los Angeles, CA 90048
213-658-6771

District Court Docket No. - 95-CV-3427

DAVID L. KAHN
plaintiff

Richard J. Archer
(See above)
[COR LD NTC]

David L Kahn
(See above)
[COR LD NTC]

v.

AT&T CORP
dba AT&T dba
American Telephone
& Telegraph Co
defendant

John A Graham
[COR LD NTC]
Leroy Anderson
[COR LD NTC]
Frandzel Share Robins Kaplan
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==========

AT&T CORP
dba AT&T dba
American Telephone
& Telegraph Co
counter-claimant

John A Graham
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Leroy Anderson
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	Sidley & Austin 555 West Fifth St Suite 4000 Los Angeles, CA 90013-1010 213-896-6000
	Steven M Bierman FAX 212-906-2021 [COR LD NTC] Alan M Unger FAX 212-906-2021 [COR LD NTC] John J Kuster FAX 212-906-2021 [COR LD NTC] Sidley & Austin 875 Third Ave New York, NY 10022 212-906-2000
AUDIO ENTERTAINMENT NETWORK INC counter-defendant	Richard J Archer [COR LD NTC] Archer & Hanson Suite 213 1426 Fillmore Street San Francisco, CA 94115 415-346-3552

		David L Kahn [COR LD NTC] David L Kahn Law Offices 535 N Hayworth Ave Suite 301 Los Angeles, CA 90048 213-658-6771
DAVID L KAHN counter-defendant		Richard J. Archer (See above) [COR LD NTC]
		David L Kahn (See above) [COR LD NTC]
5/22/95	1	COMPLAINT (Summons(es) issued (referred to Discovery Carolyn Turchin) (am) [Entry date 05/23/95]
5/30/95	2	NOTICE by plfs Audio Entertainment Network, Inc. & David L. Kahn of related case(s) L/N CV 93-6285 LEW. (gk) [Entry date 05/31/95]
6/15/95	3	ORDER RE TRANSFER PUR TO G.O. 224 (Related Case) by Judge Richard A. Paez Case reassigned to Judge Laughlin E. Waters for all further proceedings [Related to CV93-6285 LEW] (cc: all ptys) (es)

8/30/95	4	FIRST AMENDED COMPLAINT [1-1] by plaintiff Audio Entertainment, plaintiff David L Kahn. (we) [Entry date 08/31/95]
9/15/95	5	STIPULATION pursuant to local rule 3.11.1 extending time for dft AT&T Corp. to respond to complaint. (we) [Entry date 09/25/95]
10/18/95	6	NOTICE OF MOTION AND MOTION by defendant AT&T Corp to stay, and to dismiss claims purs to Rule 12 (b) (6); ; motion hearing set for 9:00 11/13/95 (jw) [Entry date 10/20/95]
10/30/95	7	Proof of service of Summons & Complaint served on Ross Markwardt, Vice president by personal service on 8/30/95. (we) [Entry date 10/31/95]
10/31/95	8	RESPONSE by plaintiff Audio Entertainment, plaintiff David L. Kahn to AT&T'S motion to stay [6-1], and to dismiss claims [6-2] (we) [Entry date 11/06/95]
11/6/95	9	REPLY by defendant AT&T Corp to plfs response re AT&T's motion to stay [6-1], and to dismiss claims [6-2] (we) [Entry date 11/14/95]

11/13/95	10	MINUTES: Proceedings stayed until 2/20/96 with the condition dft is to file its ans within 7 days from the date of todays proceedings. granting dfts motion to stay [6-1], denying dfts motion to dismiss [6-2] by Judge Laughlin E. Waters CR: Lynne Smith (we) [Entry date 11/20/95]
11/15/95	--	LODGED Ord re mot to stay & mot to dism claims purs to rule 12(b) (6) submitted by defendant AT&T Corp (FWD TO CRD) (we) [Entry date 11/21/95]
11/17/95	12	OBJECTIONS by plaintiff Audio Entertainment Network to [6-1], to dff AT&T's proposed ord re mot to stay [6-2] and mot to dism claims pursuant to rule 12 (b)(6). (we) [Entry date 11/27/95]
11/20/95	11	ANSWER to 1st amd complaint [4-1] and COUNTERCLAIM by defendant AT&T Corp against plaintiff David L Kahn, plaintiff Audio Entertainment. (we) [Entry date 12/07/95]
11/27/95	13	ORDER by Judge Laughlin E. Waters granting motion to stay [6-1] until 2/20/96, denying motion to dismiss claims puts to Rule 12 (b) (6); [6-2]. Dft AT&T shl file its answer to the

		pla's complaint on or before 11/20/95. The stay of this actn shl be w/o prej to the pla's right to obtain certification of its alleged class actn claim. CASE STAYED (ENT 11/28/95) mld CCs & nrc. (ra) [Entry date 11/28/95]
12/5/95	14	ANSWER TO COUNTERCLAIM [11-2] by counter-defendant Audio Entertainment (we) [Entry date 12/12/95]
1/26/96	15	NOTICE of hearing ; status hearing cont on 9:00 2/26/96 (jc) [Entry date 02/01/96]
2/20/96	16	JOINT STATUS REPORT (dmjr) [Entry date 02/26/96]
2/22/96	17	ORIGINAL signature page to joint status report by defendants. (we) [Entry date 02/26/96]
2/26/96	18	MINUTES: Stat Conf (cases stayed until 2/20/96) matter called, parties present, crt confers with cnsl regarding pending case in nevada. No change in stats of Nevada Case. ; status conference set on 9:00 9/16/96 (possible telephonic stat conf). by Judge Laughlin E. Waters CR: Margaret Babykin (we) [Entry date 02/29/96]

3/11/96	19	ORDER by Judge Laughlin E. Waters that the stay previously ordered in the above-entitled action shall be continued. ; status conf set on 9:00 9/16/96 (we) [Entry date 03/07/96]
9/3/96	20	NOTICE by defendant AT&T Corp of association of cnsl (jag) [Entry date 09/04/96]
9/10/96	21	JOINT STATUS REPORT (jag) [Entry date 09/11/96]
9/16/96	22	MINUTES: ; status conf reset on 10:00 1/22/97. stay continued. by Judge Laughlin E. Waters CR: Lynne Smith (jag) [Entry date 09/20/96]
1/17/97	23	JOINT STATUS REPORT (jag) [Entry date 01/22/97]
1/21/97	24	SUBMISSION of original signature pges accompanying joint stat rpt (jag) [Entry date 01/22/97]
5/20/97	25	Joint STATUS REPORT (step) [Entry date 05/21/97]
5/27/97	27	MINUTES: ; status hearing continued on 9:00 9/29/97 by Judge Laughlin E. Waters CR: L Smith (step) [Entry date 06/09/97]

5/28/97	26	MINUTES TELEPHONE STATUS CONF: Matter called. Crt inquires with parties re the status of the pending case in Nevada. crt confers with parties. Crt orders stay to con, & matter for fur status conf to: ; telephone conference set on 9:00 9/29/97 by Judge Laughlin E. Waters CR: Lynne Smith (pj) [Entry date 05/29/97]
9/22/97	28	Joint STATUS REPORT (step) [Entry date 09/23/97]
9/29/97	29	MINUTES TELEPHONIC HRG: STATUS CONF: Status conf is hereby held. the crt orders that the pre trl ord will need to be extended & therefore a status conf will be held... ; status conf set on 10:00 1/26/98 by Judge Laughlin E. Waters CR: Lynne Smith (pj) [Entry date 09/30/97]
1/16/98	30	JOINT STATUS REPORT (kh) [Entry date 01/20/98]
1/23/98	31	ORIGINAL SIGNATURE PAGE re report [30-1] by defendant AT&T Corp of David L Kahn re jt status rpt (pj) [Entry date 01/26/98]
1/26/98	32	MINUTES: ; telephone conference set on 9:00 9/21/98 by Judge Laughlin E.

		Waters CR: Lynne Smith (yc) [Entry date 02/05/98]
6/16/98	--	LODGED phv applic of John Kuster- fee paid- submitted by AT&T Corp, (FWD TO CRD) (lc) [Entry date 06/17/98]
6/16/98	--	LODGED phv appl of Robert H Easton -fee paid- submitted by AT&T Corp, (FWD TO CRD) (lc) [Entry date 06/17/98]
6/16/98	--	LODGED phv of Steven M Bierman - fee paid- submitted by AT&T Corp (FWD TO CRD) (lc) [Entry date 06/17/98]
6/16/98	--	LODGED phv of Alan M Unger -fee paid submitted by AT&T Corp, (FWD TO CRD) (lc) [Entry date 06/17/98]
6/23/98	33	APPLICATION AND ORDER of Non-Resident Attorney Steven M. Bierman to Appear in a Specific Case filed for defendant AT&T Corp, counter-claimant AT&T Corp by Robert H Easton. Designating Cathy Ostiller as local counsel. Approved by Judge Dickran Tevrizian for Judge Laughlin Waters (Fee pd) (pj) [Entry date 06/29/98]

6/23/98	34	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case filed for counter-claimant AT&T Corp, defendant AT&T Corp by John J Kuster. Designating Cathy Ostiller as local counsel. Approved by Judge Dickran Tevrizian for Judge Laughlin Waters. (Fee pd) (pj) [Entry date 06/29/98]
6/23/98	35	APPLICATION AND ORDER of Non-Resident Attorney to Appear in a Specific Case filed for counter-claimant AT&T Corp, defendant AT&T Corp by Alan M Unger. Designating Cathy Ostiller as local counsel. Approved by Judge Dickran Tevrizian for Judge Laughlin Waters. (Fee pd) (pj) [Entry date 06/29/98]
6/26/98	36	PROOF OF SERVICE by AT&T Corp on 6/26/98 of ord re phv applic of J Kuster (lc) [Entry date 06/30/98]
6/26/98	37	PROOF OF SERVICE by AT&T Corp by mail on 6/26/98 of ord re phv app1 of S Bierman (lc) [Entry date 06/30/98]
6/26/98	38	PROOF OF SERVICE by AT&T Corp on 6/26/98 by mail of ord re phv appl of R Easton (lc) [Entry date 06/30/98]

6/26/98	39	PROOF OF SERVICE by defendant AT&T Corp by mail en 6/26/98 ef ord re phv appl of A Unger (lc) [Entry date 06/30/98]
8/28/98	40	MINUTES: Crt transfers to cal of Judge Real ; status hearing set on 11:00 9/21/98 personal appr of all cnsl required by Judge Laughlin E. Waters CR: none (lc) [Entry date 08/31/98]
9/14/98	41	STATUS REPORT by plaintiffs Audio Entertainment, David L. Kahn (jj) [Entry date 09/17/98]
9/15/98	42	JT STATUS REPORT (lc) [Entry date 09/21/98]
9/17/98	43	ORIGINAL SIGNATURE PAGE of Ricahrd J Archer re jt stat report [42-1] by AT&T Corp (lc) [Entry date 09/21/98]
9/23/98	--	LODGED PROP ORD DISMISSING submitted by counter-claimant AT&T Corp, defendant AT&T Corp (FWD TO CRD) (pj) [Entry date 09/24/98]
10/1/98	44	ORDER: Pls 1st a/c is dism in its entirety w/o prej. Plf must re-file any clms asserted in their 1st a/c in the USDC of Nevada as related to the case CV-S-95-503-PLP(RLH), within 30

		dys from the date of this ord. or the actn sh be dism with prej. by Judge Manuel L. Real for the Hon. Laughlin E Waters terminating case (ENT I0/5/98), MD JS-6, mld copy to dft (pj) [Entry date 10/05/98]
10/7/98	45	PROOF OF SERVICE by dft AT&T Corp on 10/6/98 of Ord Dism Actn svcd Richard J Archer, cnsl for pla Audio Entertainment Network Inc; Svcd David L Kahn by mail (jc) [Entry date 10/09/98]
11/2/98	46	NOTICE OF APPEAL by plaintiff Audio Entertainment, plaintiff David L Kahn to 9th C/A from Dist. Court Ord filed 10/1/98 & ent 10/5/98 [44-2] (cc:David L. Kahn; Archer & Hanson; Sidiey & Austin) Fee: Paid (weap)
11/10/98	47	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 9/21/98 (Re: [46-1]) CR: Leni LeBlanc (wdc)[Entry date 11/12/98]
12/2/98	48	TRANSCRIPT DESIGNATION and ordering form for dates: 9/21/98 re transcript [47-1]CR: Leni LeBlanc (ghap) [Entry date 12/08/98]
12/11/98	49	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (wdc)

District Court Docket No. - 95-CV-3427

1/5/99	~~50~~	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [46-1] 98-56965 (wdc)

APPENDIX L

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

[Filed: September 15, 1998]

Case No. CV 95-3427 LEW (CTX)

AUDIO ENTERTAINMENT NETWORK, INC., a Nevada corporation, and DAVID L. KAHN, on behalf of themselves and others similarly situated,
Plaintiffs,

v.

AT&T CORP., formerly AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant.

Date: September 21, 1998
Time: 9:00 a.m.
Place: Courtroom 850

JOINT STATUS REPORT

[Honorable Laughlin E. Waters;
transferred to Honorable Manuel L. Real)

Plaintiffs Audio Entertainment Network, Inc. ("AEN") and David L. Kahn, and Defendant AT&T Corp. ("AT&T") hereby submit the following Joint Status Conference Report in connection with the above-entitled actions. This Joint Report supersedes Plaintiff's Status Report filed by plaintiff on or about September 9, 1998.

I. State of Discovery, Pre-Trial, and Trial

The Court has not yet set a discovery cut-off date nor any pre-trial or trial dates in this action. The Court has not permitted further motions to be filed in the present action.

II. Schedule of Contemplated Law and Motion Matters

At the Status Conference on January 26, 1998, the Court extended the stay that had been imposed initially on November 13, 1995 in this action because of a related civil action pending in the District of Nevada, MRO Communications, Inc. v. AT&T Corp., CV-S-95-503 PLP (RIH) (the "Nevada Action"). As the parties previously have informed this Court, that related action involved substantially the same parties and attorneys as well as a billing services agreement similar to the one that is at issue in this case.

At the conclusion of a two-week jury trial in May 1998, United States District Judge Philip M. Pro entered judgment as a matter of law pursuant to Fed. R. Civ. P. 50 in the Nevada Action in favor of AT&T on all claims that had not been previously dismissed. Judgment was entered on August 3, 1998 pursuant to Fed. R. Civ. P. 54(b), in favor of AT&T on all of MRO's 28 claims, and in AT&T's favor on its First Counterclaim (the "Judgment"). Two of AT&T's

counterclaims were deferred and currently are pending in the Nevada Action. Judge Pro denied MRO's motion for a new trial on July 30, 1998. On August 27, 1998, MRO filed a notice of appeal from the Judgment in the Nevada Action.

III. The Parties' Position Re: Stay Order

AT&T is confident that the Court of Appeals will affirm the Judgment in the Nevada Action. AEN, David L. Kahn, and MRO are confident that MRO will prevail on the appeal in the Nevada Action. AT&T intends to make a dispositive motion for summary judgment in this Action to dismiss most of AEN's and David L. Kahn's claims based upon the Judgment in the Nevada Action, based upon the principles of issue and claim preclusion. AEN and David L. Kahn will oppose such a motion. Rather than litigate such a motion now, or otherwise engage in potentially expensive and extensive discovery in this Action, however, all parties believe the more prudent course would be to continue the stay until the Ninth Circuit decides MRO's appeal in the Nevada Action.

If this Action proceeds now and the Court grants AT&T's anticipated motion based on claim and issue preclusion in view of the Judgment in the Nevada Action -- and if the Ninth Circuit reverses that Judgment in whole or in part -- this Court, the parties, and witnesses may be faced with duplicative pretrial discovery, motion practice and trials that can be avoided if the stay in this case remains in effect. Continuing the stay will promote judicial economy, as well as conserve the resources of the parties, because it would significantly reduce the risk that a judgment in this Action

would have to be modified in the light of the disposition of MRO's appeal to the Ninth Circuit in the Nevada Action.

Plaintiffs request that, if the stay in this Action is extended, it be without prejudice to the parties' rights to engage in class discovery and plaintiffs' right to make a motion for class certification after the stay is terminated.

IV. Miscellaneous

The parties respectfully request that the status conference be by telephone, in accordance with practice established by this Court in regard to previous status conference in this Action.

DATED: September 15, 1998

ARCHER & HANSON
Richard J. Archer

By:/s/_____
Richard J. Archer
Attorneys for Plaintiff
Audio Entertainment Network,Inc.

DATED: September ___, 1998

DAVID L. KAHN

By:/s/_____
David L. Kahn
Attorneys for Plaintiff
David L. Kahn

DATED: September 15, 1998

SIDLEY & AUSTIN

By:/s/_____
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No. 99-1533

IN THE

Supreme Court of the United States

M.C. PRODUCTS, INC., A CALIFORNIA CORPORATION; AUDIO ENTERTAINMENT NETWORK INC., A NEVADA CORPORATION; DAVID L. KAHN,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, NOW AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

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10pp

QUESTION PRESENTED

Whether the Ninth Circuit erred in affirming the district court's dismissals, under the doctrine of federal comity, of two actions duplicative of litigation on appeal from another district court, after petitioners failed to comply with an order directing them to re-file their actions in the latter district court within 30 days?

STATEMENT REQUIRED BY RULE 29.6

AT&T Corp. ("AT&T") has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

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STATEMENT OF THE CASE

In accordance with well-established principles of federal comity, the United States District Court for the Central District of California upon its own initiative dismissed these actions (the "California actions") without prejudice in 1998 to enable petitioners M.C. Products, Inc. ("MCP"), Audio Entertainment Network, Inc. and David Kahn to re-file their claims within 30 days in the United States District Court for the District of Nevada as a related matter to the case of *MRO Communications,*

Inc. v. AT&T Corp. (the "Nevada action"). (Pet. App. at 15a-19a.)[1] When petitioners opted to pursue appeals rather than re-file their claims in Nevada in compliance with the district court's orders (Pet. at 2), the California actions were dismissed with prejudice, as specified by the orders. (*Id.*)

The Ninth Circuit correctly held (and petitioners themselves do not now contend otherwise, *see id.* at 1-5) that the Nevada action involved parties, claims, and relief virtually identical to those involved in the California actions. (Pet. App. at 4a-8a, 13a-14a.) For this reason, and because counsel for petitioners repeatedly had represented to the district court that the issues in the California actions ultimately would be resolved by the Nevada action that then was on appeal to the Ninth Circuit (*see id.* at 4a-5a & n.3), the Ninth Circuit properly affirmed the district court's valid exercise of discretion over the duplicative California actions in directing petitioners to re-file their claims against AT&T in Nevada before the same judge who presided over the Nevada action. (*Id.* at 1a-14a.)[2]

---

[1] In an unpublished decision dated December 13, 1999, the Ninth Circuit affirmed in all respects the district court's dismissal of MRO's claims against AT&T. On March 6, 2000, MRO petitioned this Court for a writ of certiorari.

[2] In rendering its decision on federal comity grounds, the Ninth Circuit cited to the following admission by petitioners' counsel to the district court:

> THE COURT: What you're telling me is all the issues that are here in th[ese] lawsuit[s] are before the Las Vegas court, and have been decided by Judge Pro [of the United States District Court for the District of Nevada], or are on appeal from Judge Pro. And whatever the result of that appeal will be, it will go back to Judge Pro, if they reverse, and will be taken up by Judge Pro in Las Vegas. So why are we wasting our time?
>
> MR. ARCHER (counsel for MCP): Well, that's why we've agreed that these cases here can be stayed pending –
>
> THE COURT: No, we're not talking about stays. That's a waste of time. If Judge Pro will decide all the issues, why should we stay it?

(Pet. at 5a n.3.)

The Ninth Circuit's unpublished affirmances of the district court's dismissals of the California actions on federal comity grounds involve no issues of national concern. In addition and contrary to petitioners' contentions (Pet. at i, 2, 4), these decisions do not conflict in any way with this Court's opinion in *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 72 S.Ct. 219 (1952). The petition seeks leave to appeal only the common sense application of well-established principles of federal comity to the unique facts of these cases. Therefore, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

Petitioners' two arguments for grant of a writ of certiorari are baseless.

1. Petitioners assert on the basis of the Ninth Circuit's unreported decisions transferring the California actions that California courts will "clear dockets," and therefore, the decisions should be addressed. (Pet. at 3.) This concern is unfounded. Under the Ninth Circuit's Local Rule 36-3, orders like the ones at issue, not designated for publication, "shall not be regarded as precedent and shall not be cited to or by [the Ninth Circuit] or any district court of the Ninth Circuit . . . except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." Ninth Circuit Local Rule 36-3. Therefore, the decisions below are without precedential value and will have no potential impact on other courts that could justify review.

Moreover, the facts involved here are unlikely to be repeated. Here, two companies owned and operated by David Kahn, as well as Kahn himself, not only filed two separate actions in California admittedly involving the same claims, parties and requested relief as those in the Nevada action, but conceded to the courts below that the resolution of the Nevada action on appeal would control the determination of the California ac-

tions. (Pet. App. at 4a-8a, 13a-14a.) These *sui generis* facts are no basis for a general reduction of the California docket.

2. Petitioners contend that the Ninth Circuit erroneously departed from the doctrine of federal comity set forth in this Court's opinions in *Kerotest* and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976). (Pet. at 2-4.) According to petitioners, because *Kerotest* affirmed a stay (not a dismissal) of duplicative litigation, and because the decision in *Colorado River* was predicated on comity concerns related to a federal statute (the McCarran Amendment) not implicated by the present cases, the Ninth Circuit's unpublished decisions affirming the dismissals with prejudice after petitioners failed to re-file their claims in Nevada are "contrary" to *Kerotest* (and implicitly, *Colorado River*, which expressly relied on *Kerotest*). (Pet. at 2-4.)

However, as the Ninth Circuit here properly acknowledged, *Kerotest* and *Colorado River* stand for a broader principle: they vest federal courts with the authority to avoid duplicating litigation proceeding in other federal courts. (Pet App. at 3a-4a (citing *Kerotest*, 340 U.S. at 183-84); Pet. App. at 13a-14a (citing *Colorado River*, 424 U.S. at 817).) Indeed, *Kerotest* observed that because the problem of duplicative litigation cannot be addressed by "rigid mechanical solution[s]," federal courts "[n]ecessarily" are vested with "an ample degree of discretion" in addressing such situations. *Kerotest*, 342 U.S. at 183-84, 72 S.Ct. at 221; *see id.* ("wise judicial administration" encompasses a wide range of solutions geared at conserving judicial resources and comprehensively disposing of litigation to avoid inconsistent judgments). Thus, wholly consonant with *Kerotest*, the Ninth Circuit properly affirmed the reasonable solution devised by the district court to avoid duplication by the California actions – a solution that petitioners opted to disregard. (Pet. App. at 8a); *see also Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223-24 (7th Cir. 1993) (affirming dismissal of

duplicative litigation pending in another federal court on comity grounds); *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985) (same); *Church of Scientology of California v. United States Dep't of Army*, 611 F.2d 738, 749-50 (9th Cir. 1979) (same).

The petitioners also are mistaken in asserting that the Ninth Circuit's unpublished decisions are "contrary" to 28 U.S.C. § 1404(a), the federal statute that governs changes of venue. (Pet. at 4; *see also id.* at 3.) Section 1404(a) authorizes a district court, "[f]or the convenience of parties and witnesses" to transfer, "in the interest[s] of justice," a "civil action to any other district or division where it might have been brought." *Id.* But the decisions below were not animated by convenience; they addressed the need to conserve judicial resources and avoid duplicative litigation and inconsistent judgments. Neither *Kerotest* nor *Colorado River*, which also focused on judicial considerations, cited to §1404(a). Therefore, petitioners' assertion that the Ninth Circuit failed to "follow[]" § 1404(a) (Pet. at 4), is utterly irrelevant. The unpublished decisions at issue involved the application of settled principles to unique facts and do not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether a district court has the power, without prior notice to the parties, and contrary to Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952), and contrary to 28 U.S.C. Section 1404(a), to dismiss sua sponte an action with prejudice, unless within 30 days the complaint is refiled in another district.

PARTIES TO THE PROCEEDING

Petitioners

M.C. Products, Inc. ("MCP") is a California corporation. Bellatrix International, Inc. owns 100% of its outstanding stock. Audio Entertainment Network, Inc. ("AEN") is a Nevada Corporation. Petitioner David Kahn owns 100% of its outstanding stock.

Respondent

The respondent is AT&T Corporation.

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REASONS FOR GRANTING THE WRIT

I. DEPARTURES FROM PROCEDURAL RULES ESTABLISHED BY THIS COURT AND CONGRESS MUST BE CORRECTED.

Procedural rules may not involve complicated legal reasoning but they always involve many cases filed and to be filed in every federal District Court. The action taken in these cases will affect every action which has a companion or even somewhat similar action pending in another federal District Court. In these cases the District Judge ordered (App. C at 16a):

> Plaintiff's Second Amended Complaint is dismissed in its entirety without prejudice. Plaintiff must re-file any claim(s) asserted in its Second Amended Complaint in the United States District Court for the District of Nevada, as a related matter to the case captioned MRO Communication Inc. v. AT&T Corp., CV-S-95-503 PLP (RLH), within 30 days from the date of this Order, or the Action shall be dismissed with prejudice.

These orders are contrary to Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 72 S.Ct. 219 (1952) in that Kerotest affirmed a stay, not an order to dismiss with prejudice claims on which the statute of limitations will have run.

The orders are also contrary to 28 U.S.C. Section 1404(a) which authorizes a transfer, not a stay.

AT&T does not dispute that neither Kerotest (and its progeny) nor Section 1404(a) authorize the orders in these cases; AT&T says a "broader principle" is involved: avoidance of duplicating litigation (AT&T Br. 4-5). But that "broader principle" is effectively and adequately served by Kerotest and Section 1404(a); AT&T has not shown otherwise. We are thus left with AT&T's assurance to the effect: "Not to worry, the Court of Appeals memorandum is unpublished" (AT&T Br. 3). Unpublished but not uncirculated on the Internet! The unpublished nature of the memorandum should not be allowed to preserve it. While this order has been circulated, there may have been others of a similar nature which have not been appealed or circulated. Certainly, District Courts will be informed of this Memorandum as a possible docket-clearing procedure.

CONCLUSION

The Petition should be granted to correct the District Court's departure from the accepted and usual course of Judicial proceedings.

Dated: April 28, 2000.

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